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PRIOR APPROPRIATION IN MISSISSIPPI—
A STATUTORY ANALYSIS

William M. Champion

RESERVATION AND EXCEPTION OF MINERALS
IN MISSISSIPPI CONVEYANCING

Jack H. Ewing

THE ECONOMIC RECOVERY ACT

Russell Troutman

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Mississippi Law Journal

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PRIOR APPROPRIATION IN MISSISSIPPI— A STATUTORY ANALYSIS

*William M. Champion**

I. Introduction

In 1956 the Mississippi legislature adopted a surface water appropriation act embracing many of the principal concepts of the California doctrine of prior appropriation.[1] This act was the culmination of efforts commenced by a number of interested groups following unusually severe droughts in 1952 and 1953.[2] Since that time, however, the supply of surface water has apparently been sufficient for all competing users because no case involving this act has reached the Mississippi Supreme Court,[3] nor have any requests for water allocations been rejected due to

* B.S., LL.B., LL.M., Associate Professor of Law, University of Mississippi. The research for this article was compiled by the author while he was an employee of the Natural Resource Economics Division, Economic Research Service, United States Department of Agriculture, in cooperation with the Legal Institute of Agricultural and Resource Development at the University of Mississippi School of Law. However, the following article does not necessarily reflect the opinion of the United States Department of Agriculture. The author wishes to express his appreciation to Mr. Harold Ellis of the Economic Research Service, United States Department of Agriculture for his encouragement and his many helpful suggestions, many of which have been incorporated.

[1] Miss. Code Ann. §§ 5956-01 to -30 (1956).

[2] A brief history of this law is found in Mississippi: Board of Waters Commissioners, Semiannual Report 1-4 (1958).

[3] This writer has been unable to learn of any cases involving this act which have been filed in trial courts. In one case, Thomas v. Blaylock, No. 7229, Chancery Court, Rankin County, Miss., October 8, 1957, the defendant, Blaylock, moved to have the Board of Water Commissioners, who were not parties to the litigation, ordered to make a study of the stream involved in the litigation, and the alleged interference with it, in order to "permit a proper determination of the rights of the parties. . . ." The defendant relied upon Miss. Code Ann. § 5956-24 (1956) as directing the Board to perform such services. The motion apparently was not ruled upon for no order relative thereto appears in the court file. The act was not otherwise involved in the case for neither party had obtained an allocation from the Board. The case itself was an action for the wrongful interference with the natural flow of a small creek.

insufficiency of supply.[4] Thus, there has been no judicial determination of the meaning of any portion of this law.

The purpose of the present article is to examine the act in the light of Mississippi's riparian background, administrative interpretation of the act, and western experience in prior appropriation so as to draw some conclusions, perhaps tentative ones, as to its meaning. Because questions of constitutionality are beyond the scope of this article, all conclusions will be based on the assumption that the act is constitutional.[5]

II. Summary of the Act†

With its entry into prior appropriation Mississippi adopted a permit system that protects vested riparian rights and prohibits the total depletion of stream flow.

While the Mississippi system is properly characterized as representing the California doctrine of prior appropriation—that is, it recognizes both appropriative and riparian rights—unlike the California doctrine in its purest form, the Mississippi law enjoins riparians from the exercise of their rights without either an adjudication of those rights or a permit to exercise them.[6]

The act affords protection as vested rights to those riparian rights being lawfully exercised between April 6, 1953, which was three years

[4] The records in the office of the Board of Water Commissioners in Jackson, Mississippi, show that only 30 out of 1,246 files were closed without an allocation being made. Of these 30 there were 18 in which the claimant or applicant had no concrete plans for actual use of the water, but was apparently seeking to perfect a right which might be exercised at an undetermined later date. There were 6 instances of separate requests being made for each anticipated diversion point, although all the water was to be diverted from one stream and applied to the same tract of land. Any requests duplicated by the same person were combined into one, and the additional files closed. There were two instances of a request being made by a tenant. They were advised that the landowner himself would have a file with the Board. There were two incomplete requests wherein the Board had asked for additional information which was not given. These files were subsequently closed. There were 2 instances where a second file on a single request was inadvertently opened.

[5] Some question as to the Act's constitutionality has already been raised in Wynn, *Mississippi Water Conservation Law*, 28 Miss. L.J. 191, 223-224, 226, 229 (1957).

† This section of this paper originally appeared as a portion of a paper, "Transition From Riparian Doctrine," which was delivered by this author on April 24, 1967, at the Water Resources Law Colloquium sponsored by the Institute for Research on Land and Water Resources of the Pennsylvania State University, and which was published as Publication Number 51 in said Institute's Informational Series. This author expresses appreciation to said Institute, and its Director, Dr. John C. Frey, for permission to reprint this portion of the original paper. The purpose of this section is to give an overview of the Mississippi Statute, and necessarily includes some generalizations that are subject to exceptions. These exceptions are dealt with elsewhere in the paper.

[6] *Compare* Cal. Water Code § 101, *with* Miss. Code Ann., § 5956-04(a) (1956).

prior to the effective date of the act, and December 31, 1958. The holders of these rights were given until December 31, 1958, to file with the Mississippi Board of Water Commissioners a claim of their rights. Upon receipt of these claims the Board would examine them along with all supporting data and enter them on the docket for its monthly public meeting. At the meetings, after hearing whatever evidence was offered by opponents of the claim or by the claimant himself, the Board would enter an order of determination adjudicating the claimant's rights.

This order might be an acceptance in full, an acceptance in part, or an outright denial of the claim. However, the act apparently does not vest the Board with the discretion to reject or modify a claim on any grounds, other than for containing incorrect information as to the extent of the prior exercise of the riparian right. In other words, availability of water is not a factor in accepting or denying claims. The Board does not grant rights to claimants; the rights are granted by the act itself. The Board merely adjudicates the validity of the claims and issues an order which is evidence of the right.

The effect of the order of determination is to define the extent of the right and to identify it as a right superior to all those acquired subsequent to December 31, 1958. The statute does not establish any order of priority among the claimants, and it is silent on the question of resolving conflicts among them. These conflicts will undoubtedly be settled according to some concept of either apportionment or riparian rights. However, it might be noted parenthetically that Mississippi's pre-statute law was so undeveloped that the Court had not even ruled on whether it was a natural flow or a reasonable use state.

Those who initiate their use of water subsequent to December 31, 1958, must submit an application for a water right with the Board prior to diverting water or prior to the construction of diversion works. These applications are handled in essentially the same manner as were pre-statute claims, with the additional requirement that the Board must establish the average minimum stream flow or lake level where necessary and deny any application that will invade this established average minimum. The average minimum flow is the "average minimum daily flow occurring during each of the five lowest years in the period of the preceding twenty consecutive years."[6A] The average minimum lake level is similar.

When the Board approves these applications, it issues a permit to the applicant. This permit constitutes full authority for the permitee to construct his diversion works and to apply the water to a beneficial use in accordance with his application. No further authority is needed, and after the diversion and application of the water, the appropriation is

[6A] Miss. Code Ann. § 5956-02(i) (1956).

perfected. Nevertheless, once these steps have been taken, the Board issues a license which is evidence of the perfected appropriation.

The effect of the permit or license is to define the extent of the appropriation right and to designate its priority date. It is convenient, and perhaps not terribly incorrect, to say that all rights of permitees are junior in priority to those of claimants. Among the permitees, however, a system of priorities based on "first come, first served," does exist. The priority date is the date the application was received by the Board. Although the statute does not spell out the significance of the priority, it is reasonable to assume that the courts will follow the lead of the western states and declare that in the event of an insufficient water supply those having senior priorities may continue their diversions, while the juniors must desist, in order to provide enough water to satisfy the appropriations of the seniors.

A water right under the Mississippi Act, whether it belongs to a claimant or a permitee, is defined in terms of a maximum quantity of water, diverted at a maximum rate of diversion, during a stated time interval, from a specific source of supply, and applied to described lands for a designated purpose. Additionally, the permitee's right includes his priority date.

Once the right has been perfected it is held in perpetuity, subject to forfeiture for non-use or unauthorized use for a period of three consecutive years. This apparently is an automatic forfeiture. The act also provides that a right may be terminated by a court of competent jurisdiction. The grounds for such a termination are not stated. Finally, the statute provides that, for "good cause shown," the Board may modify or terminate water allocations. The term "good cause shown" is not defined.

Water rights under the act appear to be transferable subject to moderate restrictions. There is no mention of the situation where a landowner conveys the land for which a water allocation has been made without taking any affirmative steps concerning the allocation. In this situation the right probably passes with the land unless clearly reserved from the conveyance. Certainly where the transfer of the land ownership specifically includes the transfer of the water right, the latter conveyance will be effective.

A companion situation arises where a landowner has an allocation to use water on parcel A and wishes to change the place of use to parcel B. This is permitted, provided the Board approves the change in place of use. Naturally, the water right may be sold to another and transferred to his land, subject to the same approval.

Finally, it must be noted that two types of use and several sources of water are excluded from the provisions of the act. Domestic users may follow the procedures outlined in the act, but this is not required

of them. Also, the statute is not applicable to dredging or washing of sand or gravel. Of the sources of water excluded from the law, ground water is the most significant. However, there are several other excluded sources. A landowner has the right to use water from springs or streams arising or originating on his property and to dam gullies and use the water captured thereby without Board allocation. Then the landowner may construct a dam on a stream having a minimum flow of not more than one-half million gallons per day and utilize up to 300 acre feet of the water.

There are several important observations that should be made concerning the act. It protects vested rights while imposing a permit system on applicants, but it does not provide for the continued exercise of riparian rights as such. Furthermore, the act does not provide a method of resolving conflicts among holders of vested prior rights. All allocations are granted in perpetuity subject to divestment for non-use or improper use. While these rights are not as freely alienable as is land, they may be transferred with Board approval. Unlike most appropriative schemes the Mississippi law prohibits the appropriation of the entire stream flow. Finally, the statute does not recognize the inter-relationships of surface and ground water.

III. Uses Regulated

Before launching into an examination of the manner in which the act regulates allocations, it would be best to identify those instances and areas in which the act operates and those which are exempt from its provisions.

In its declaration of policy the act states that water, "occurring in any watercourse, lake or other natural water body of the State . . ." is subject to appropriation in accordance with the provisions thereof.[7] The term "watercourse" is defined as:

> [A]ny natural lake, river, creek, cut or other natural body of fresh water or channel having definite banks and bed with visible evidence of the flow or occurrence of water, except such lakes without outlet to which only one landower is riparian.[8]

Neither "lake" nor "other natural water body" is defined. Thus, essentially all uses and sources of water appear to be included unless elsewhere exempted.

The definition of watercourse given above contains two exemptions. A watercourse is defined in terms of a natural body of *fresh* water, thereby implicitly excluding bodies of salt water. The definition also expressly excludes certain lakes.

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[7] Miss. Code Ann. § 5956-01(b) (1956).

[8] Miss. Code Ann. § 5956-02(h) (1956).

The foregoing exclusions, as do virtually all other exclusions in the act, remove from the act's operation diversions from certain sources of water. There are, however, two exemptions based upon the use made of the water. First, the act is, by express terms, not applicable to "dredging or washing of sand and gravel."[9] Also, the act is not to interfere with the customary use of water for domestic purposes, although the domestic user may *elect* to establish his right under the procedures provided in the act.[10] Domestic purposes include ordinary household uses, watering of livestock, and irrigation of gardens and lawns.[11] The statute contains no language indicating why a domestic user might want to avail himself of its procedures in further establishing a right that he already has. Interestingly enough, however, 110 domestic users have made this election.[12]

The single most significant source of water exempt from allocation under the provisions of the act is ground water.[13] It is perhaps regrettable that this law does not fully integrate the appropriation of both surface and subsurface waters, but it is encouraging that no separate system for dealing with ground water has been adopted. The only Mississippi law relating to ground water is a well drillers licensing act.[14]

It is also provided in the law that:

> [N]othing herein shall operate to deprive any landower of the right to the use of the water from a spring arising on his land so long as such use does not interfere with the right of any water user below. . . .[15]

Two observations concerning this portion are in order. First, it protects the rights of any water user below. Inasmuch as the State now recognizes administratively adjudicated rights only, this section clearly means that an adjudicated right is superior to the landowner's right where the spring waters flow into a watercourse. Thus, the landowner's right to divert without a permit affords no protection against a competing user who has a permit.

Furthermore, some appropriation statutes appear to give the landowner a broad right to use spring water without a permit,[16] when

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[9] MISS. CODE ANN. § 5956-03 (1956).

[10] MISS. CODE ANN. § 5956-04(a) (1956).

[11] MISS. CODE ANN. § 5956-02(c) (1956).

[12] This figure and all other statistical information relating to allocations or requests for same was obtained from the files in the office of the Board of Water Commissioners in Jackson, Mississippi. The majority of this information has been transposed onto IBM cards upon which the author relied in research for this article.

[13] MISS. CODE ANN. § 5956-01(c) (1956).

[14] MISS. CODE ANN. § 5956-31 to -35 (1956).

[15] MISS. CODE ANN. § 5956-04(a) (1956).

[16] *See, e.g.*, ORE. REV. STAT. § 537.800 (1953).

actually he is quite limited in this respect. The Oregon statute states that the use of spring water is regulated by the laws pertaining to running streams, provided, however, that the landowner upon whose land the spring arises "shall have the right to the use of such waters."[17] This has been construed as meaning that where these waters do not flow so as to constitute a watercourse, the landowner is entitled to their exclusive use. However, if they form a watercourse, the waters are subject to appropriation as are those from any other watercourse, and the landowner must obtain a permit.[18]

This result is strongly suggested by the Mississippi Act. This act operates only on waters in watercourses, lakes, or other natural bodies of water, thus impliedly excluding diffuse surface waters. Therefore, spring waters which do not form any portion of a watercourse would automatically be exempt from regulation by the act. The present section stipulates that the right may be exercised provided it does not interfere with the rights of any user below. Logically, this means that the landowner who, without a permit, uses spring water forming a watercourse will always be subordinate in priority to a lower user who perfects his rights with the Board. Accordingly, the landowner has no right save against another without a statutory allocation.

The act further states that nothing therein shall interfere with a landowner's right to place a dam across a gully on his property or across a stream that originates on his property so long as provision is made for continued established average minimum stream flow when needed.[19] The established average minimum stream flow is merely the average minimum daily flow occurring during each of the five lowest years of the immediately preceding twenty years.[20]

This exemption actually involves two separate features. It deals with gullies and with certain streams. Insofar as the gully is concerned, this provision may serve to clear up potential uncertainty. Normally, water enters a gully as diffuse surface water, and is discharged a relatively short distance downhill as diffuse surface water. This act does not regulate surface water capture, so the gully should not normally be affected by its provisions. However, the definition of "watercourse" in the act is not sufficiently clear to rule out a gully. It speaks in terms of a natural body of fresh water or a channel, having definite banks and bed with visible evidence of the flow or occurrence of water, but it makes no mention of the source of the water, its continued flow, nor where it is discharged.[21] In an early Mississippi case the court held that

[17] *See, e.g.*, ORE. REV. STAT. § 537.800 (1953).
[18] Fitzstephens v. Watson, 218 Ore. 185, 344 P.2d 221 (1959).
[19] MISS. CODE ANN. § 5956-04(a) (1956).
[20] MISS. CODE ANN. § 5956-02(i) (1956).
[21] MISS. CODE ANN. § 5956-02(h) (1956).

a "creek" which was only one-half to three-fourths of a mile in length, which was dry most of the year, and which *discharged onto low lands in the vicinity of a watercourse* was itself a watercourse.[22] Clearly, many gullies would meet these qualifications.

It should be observed, however, that a gully does not necessarily discharge onto lower lands, but may discharge directly into a watercourse. A question may then arise as to when the diffuse surface waters that flow into the gully become waters in a watercourse and subject to appropriation under the act. The subject exemption merely serves to prevent possible litigation over water rights in a gully, since without it one may argue that a gully is a watercourse under the Mississippi definition.

The provision concerning the damming of streams originating on the appropriator's property presents a slightly different situation. It must be noted that this section does not grant or create any new right, but merely declares that the statute shall not interfere with those rights already in existence. Thus, while the common law right to proceed without a permit is apparently preserved, the extent to which one can dam a stream arising on his own land would be almost limited by the riparian doctrine.

Under the riparian doctrine two principles as to relative rights in watercourses exist. The first of these, the natural flow theory, holds that a riparian owner is entitled to have the water flow to, and away from, his land undiminished in quantity.[23] The other theory, sometimes referred to as the "true rule," holds that water is the common property of all riparian owners and is subject to reasonable beneficial use by each.[24]

At first blush the subject exception would appear to be materially affected by which of the two theories prevail. If the appropriator applied for a permit he could be allotted an amount which, when combined with other appropriations, would reduce stream flow to the established minimum. Since such minimum is based upon the five lowest flows of the preceding twenty years, withdrawal down to the minimum would violate the natural flow principle. Thus, theoretically, the landowner could enjoy a greater right by obtaining a permit than by relying on this exemption. On the other hand, withdrawals down to and even beyond the minimum could be considered a reasonable beneficial use taking into consideration

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[22] Ferris v. Wellborn, 64 Miss. 29, 8 So. 165 (1886); *cf.* Belzoni Drainage Commission v. Winn, 98 Miss. 359, 53 So. 778 (1910). *But see,* Palmer v. Massingill, 214 Miss. 379, 58 So. 2d 918 (1952), where the court defined a watercourse as discharging into some substantial reservoir or body of water. However, the only authorities cited for this definition were *Wellborn* and *Winn, supra.*

[23] *E.g.,* 2 H. FARNHAM, WATERS AND WATER RIGHTS § 464 (1904) [hereinafter cited as FARNHAM].

[24] *Id.* at 1574.

the common needs of all riparian to it.[25] Under the reasonableness theory, then, the user might find that his advantage lies in not applying for a permit. The Mississippi court has not specifically adopted either principle.

This distinction, however, may be of little practical moment. Inasmuch as no right to appropriate or use water subject to appropriation can be initiated or acquired except upon compliance with the statute,[26] virtually no one but the holders of statutory allocations can complain of the amount withheld behind the dam. While the exempt users may have standing to complain, their numbers are so limited that they present little problem. Clearly, the appropriators have no standing if they receive sufficient water to satisfy their allocation. The provision under discussion requires that the landowner allow for continued minimum flow when necessary to protect the rights of users below. Because the act gives the board authority to make allocations only of the excess above established minimum flow,[27] obviously the rights of these users below can be protected only by releasing an amount equal to the sum of the established minimum flow, the amount of the allocation, and the amounts that will be lost by evaporation and seepage. It is, therefore, relatively unimportant whether the landowner would have the right, as a riparian, to dam the stream and withhold any certain amount.

The final exemption written into the statute also concerns damming streams. The act provides that:

> Subject to the common law, or other lawful water rights of others, any person may build and maintain a dam on any stream having a minimum flow of not more than one half million gallons of water per day and utilize up to three hundred (300) acre feet of the impounded water without a permit from the board so long as such action does not affect the established average minimum flow in the stream below the dam. . . .[28]

This subsection, while creating the right to utilize as much as 300 acre feet[29] of impounded water without a permit, is specifically made subject to the common law as well as to other lawful water rights. This means that common law restrictions as to the amount which can be utilized are no longer in force provided the appropriative rights of others are protected, but, aside from the lifting of this restriction, all other common law limitations on the damming of streams and utilization of

[25] *E.g.*, C. MARTZ, RIGHTS INCIDENT TO POSSESSION OF LAND § 28.56 (1954) [hereinafter cited as MARTZ].

[26] MISS. CODE ANN. § 5956-04(a) (1956).

[27] MISS. CODE ANN. § 5956-04(c) (1956).

[28] MISS. CODE ANN. § 5956-04(b) (1956).

[29] An acre foot is the amount of water required to cover an acre of land to a depth of one foot, or 325,851 gallons. Thus, 300 acre feet is the amount of water required to cover 300 acres of land to a depth of one foot.

water still apply. Also, even this derogation of the riparian rules applies only to streams having a minimum flow of not less than one half million gallons per day.

As shown earlier, the riparian doctrine does not define the right to use water in terms of specific quantities, but allows such use as is reasonable in light of all surrounding circumstances.[30] Accordingly, the foregoing subsection indicates that the utilization of any amount up to 300 acre feet is reasonable provided it does not infringe upon the rights of other users. These are, of course, appropriative rights. Actually, in this context the word "utilize" is troublesome. True, the statute authorizes the utilization of a specified maximum, but it also allows the impoundment of an unspecified excess amount. While this excess is not applied to a beneficial purpose by the user, it is withheld from lower users, and one might well argue that it also is "used." This, however, is not the administrative treatment accorded the term.[31] Thus, the maximum quantity that may be impounded without a permit under this subsection is controlled by appropriative rights granted lower users.

The common law restrictions written into this provision might prove troublesome. Under the riparian doctrine, which was the common law in Mississippi at the time the statute was passed, there is no specific right to dam streams, large or small. However, the aforementioned rule of reasonable use does come into play so as to permit dams under certain circumstances.[32] Generally, the upper riparian has the right to detain and store seasonal floods so long as his use of the waters and the detention are reasonable.[33] While seasonal storage of waters often is not considered a proper riparian use, nevertheless, the lower riparian must show that it substantially interferes with an existing or prospective riparian use in order to maintain an action for injunctive relief.[34] Thus, where there was neither a showing that the defendant's use was unreasonable, nor that stream flow was appreciably diminished because of the dam, an action for injunction would not lie.[35] Of course, if the use to which the water will be put must be reasonable, it must be one of the recognized riparian uses.[36] There are no Mississippi cases delineating which uses are

[30] See text accompanying nn. 23, 24 & 25, *supra.*

[31] The Board of Water Commissioners considers that the quantity "used" is only that amount actually applied to a beneficial use and does not include the entire quantity impounded.

[32] There are no Mississippi cases dealing with the lower riparian's complaint against stream damming by the upper riparian.

[33] State v. Apfelbacher, 167 Wisc. 233, 167 N.W. 244 (1918).

[34] Colorado Power Co. v. Pacific Gas & Elec. Co., 218 Cal. 559, 24 P.2d 495 (1933).

[35] Heise v. Schulz, 167 Kan. 34, 204 P.2d 706 (1949) (impounded water used for irrigation).

[36] *See* Herminghaus v. Southern Cal. Edison Co., 200 Cal. 81, 252 Pac. 607 (1926).

proper riparian uses, but it is logical to assume that the normally accepted domestic use, power development, and water for irrigation[37] would be allowed.

Applying the foregoing principles to the subsection of the act now under consideration, it is apparent that one may, without a permit, construct a dam across a small stream and withhold an amount of water which will reduce stream flow to the established average minimum, provided this does not interfere with any allocations granted by the Board. This is a radical departure from the common law. Beyond that, the one creating the impoundment may withdraw up to 300 acre feet but, because the act is silent as to the use to which this water may be put, it is undoubtedly limited to the traditional riparian uses. Also, apparently anyone who can gain lawful access to the stream may construct such an impoundment. Under the riparian doctrine only those whose land is contiguous to the stream, have any rights therein,[38] but this section speaks in terms of "any person" building a dam on "any stream" with a flow of not over one half million gallons per day. Thus, the statute seems to abrogate this common law limitation, and extends the right to use to all persons, as is true under prior appropriation.[39]

One note of caution concerning the preceding subsections on the damming of streams is in order. The discussion so far has been limited to considerations of the relative positions of the one damming the stream and lower users. This is as far as the provisions of these exceptions to the act extend, and further problems must be governed by the common law. This means that the prohibition against damming a stream and casting the waters back onto the property of an upstream landowner still operates undiminished in force. It is well established in Mississippi that one cannot interfere with the natural flow of a stream and thereby back up its waters onto the land of an upper owner.[40]

IV. Priorities and Preferences

The statute creates a seven member Board of Water Commissioners to administer its provisions.[41] The Board is, in turn, authorized to employ a water engineer who also serves as executive officer of that body.[42] All requests for allocations are directed to the Board's office in Jackson, Mississippi, where they are considered by the engineer. He makes his recommendations to the Board which then grants or denies the request

[37] *E.g.*, 2 Farnham § 467.
[38] *E.g.*, J. Angell, Watercourses § 5 (1850).
[39] *E.g.*, Martz § 28.58.
[40] *E.g.*, Jones v. George, 126 Miss. 576, 89 So. 231 (1921).
[41] Miss. Code Ann. § 5956-08 (1956).
[42] Miss. Code Ann. § 5956-10 (1956).

in full or in part. After an allocation is made, the engineer forwards the proper documentation to the user.[43]

The Board recognizes two types of users: those whose use had commenced on or prior to the effective date of the act[44] (hereinafter called "claimants" or "prior users"), and those whose initial use was subsequent thereto[45] (hereinafter called "applicants," "permitees," or "subsequent users"). The statute treats these two types quite differently, so they should be considered separately.

A. Priorities

1. *Prior Users*

There is obviously room for questioning the constitutionality of a law which would deprive riparians actively exercising their riparian rights of the opportunity to continue their water usage.[46] The Mississippi act seeks to avoid this pitfall by giving all prior users the first opportunity to perfect their rights under the statute.

Under the definitions portion of the act the word "appropriation" is defined as including:

> [T]he right to continue the use of water having actually been applied to any beneficial use at the time of the effective date of [the] Act, or within three (3) years prior thereto to the extent of the beneficial use made thereof.[47]

This section also includes those instances where a person is bona fide engaged in the construction of diversion works on the effective date of the act.[48]

The act, in setting a deadline for initiating the exercise of riparian rights, declares:

> After April 1, 1958, no right to appropriate or use water subject to appropriation shall be initiated or acquired except upon compliance with the provisions of this act, and no person shall take water from a stream, lake or other watercourse without having a valid right to do so. Provided, however, that any person or persons claiming their rights under section 2 (g) (2), chapter 167, laws of 1956 (§ 5956-02), where that person had begun to make beneficial use of water at the time of the effective date of

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[43] All information concerning the functioning of the board was supplied by the engineer, Mr. Jack Pepper, whose enthusiastic help and encouragement the author gratefully acknowledges.

[44] MISS. CODE ANN. § 5956-13 (1956).

[45] MISS. CODE ANN. § 5956-16 (1956).

[46] *See* O'Connell, *Iowa's New Water Statute—The Constitutionality of Regulating Existing Uses of Water*, 47 IOWA L. REV. 549 (1962).

[47] MISS. CODE ANN. § 5956-02(g)(2) (1956).

[48] MISS. CODE ANN. § 5956-02(g)(3) (1956).

> chapter 167, laws of 1956 (§§ 5956-01 et seq.), which was April 6, 1956, or within three (3) years prior thereto, or after April 6, 1956, until December 31, 1958, shall file their claim with the board of water commissioners on or before December 31, 1958. . . .[49]

This provision is less than clear, and it will be examined in detail later in this section.

Finally, the statute requires that the Board determine and establish the rights of all water users making beneficial use of water on the effective date of the act. This administrative determination is made the subject of a written order called an Order of Determination, which is furnished to the claimant, and a copy thereof is filed in the office of the chancery clerk for the county wherein the point of diversion is located.[50]

Thus, three sections clearly demonstrate that the prior user is protected in his use provided he files his claim on time. Although the statute expressly prohibits the granting of allocations in an amount greater than the established minimum flow[51] or lake level,[52] except for enumerated special cases, the board feels that protection of the prior user was intended to be paramount, and it has granted each claim regardless of demand on the watercourse.[53]

The problems which arise under these protective provisions are, (1) who is eligible to qualify as a prior user, and (2) what system of priorities, if any, exists among the several claimants.

a. *Who Are Prior Users*

Reading only the definition of appropriation, one would conclude that the only users eligible to qualify as claimants were those whose riparian right had been exercised within three years prior to the effective date of the law, or who had actually commenced the construction of diversion works by April 6, 1956, the date of the law. This, however, is apparently broadened by section 5956-04(a)[54] which provides a cut-off date for the initial exercise of riparian rights.

Actually, this entire subsection, even without its apparent contradiction of the appropriation definition, is quite confusing. In the first instance it states that no right to appropriate or use shall be initiated or acquired after April 1, 1958, save under the provisions of the statute. It then proceeds to declare that those persons who claim their rights

[49] Miss. Code Ann. § 5956-04(a) (1956).

[50] Miss. Code Ann. § 5956-13(a)-(b) (1956).

[51] Miss. Code Ann. § 5956-04(c) (1956).

[52] Miss. Code Ann. § 5956-04(d) (1956).

[53] This is one of the most significant developments under the act, because out of 1,269 requests for allocations 1,162 were submitted by claimants.

[54] Miss. Code Ann. § 5956-04(a) (1956); see text accompanying n. 49, *supra.*

under section 5956-02(g)(2),[55] the definition section, where such person had begun the beneficial use of water within the time stated in that section, or between the effective date of the act and December 31, 1958, must file his claim on or before December 31, 1958. In other words, the act first declares that no new riparian diversions shall be initiated after April 1, 1958, and then, in the next sentence, allows such initiation up until December 31, 1958.

As originally passed, this section contained no reference to any cut-off date other than April 1, 1958; it did not refer to the definition of appropriation; and it did not spell out the consequences of late filing.[56] In amending the section in 1958 the legislature apparently sought to correct this latter oversight. However, a penalty for late filing should not be adopted subsequent to the filing deadline, and in this instance the amendment was not voted on by the House of Representatives until April 30, 1958.[57] Therefore, it was necessary to extend the deadline, but somehow the reference to April 1, 1958, remained in the amended version. This leads to the conclusion that this conflict might be the result of a scrivener's error. If so, the error is in the act as passed by the legislature, for the records in the office of the Secretary of State show that the amendment, as passed by the House and the Senate and signed by Governor Coleman, is identical with the version appearing in the Code.

None of the foregoing, however, resolves the question of who may qualify as a prior user under the amended act. If April 1, 1958, is considered the cut-off date for initiating new uses, apparently the subsequent reference to December 31, 1958, is meaningless. On the other hand, if the latter is the cut-off date, the former appears to be without meaning.

At least two possible avenues for resolving this dilemma are open. The first, but least persuasive, would be to consider that the act creates two types of prior users; those who commenced their use on or before April 1, 1958, and those who commenced it between that date and December 31, 1958.[58] The difficulty with this reasoning lies in the fact that nowhere else does the statute even allude to separate categories of claimants. Furthermore, this approach ignores the clear statement in the first sentence of section 5956-04(a)[59] which prohibits the further acquisition of water rights except under the statutory scheme after April 1, 1958.

The alternative construction is to consider that the portion of the first sentence of the subsection which establishes the April 1, 1958 cut-off,

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[55] MISS. CODE ANN. § 5956-02(g)(2) (1956).

[56] Miss. Laws 1956, ch. 167, § 4(a).

[57] MISS. H. R. JOUR. Reg. Sess. 1958, p. 1240, H.B. 556.

[58] There would be 17 users claiming 160,901 acre feet in this category. These claimants divert from 12 different sources.

[59] MISS. CODE ANN. § 5956-04(a) (1956).

is repealed by implication in the second sentence, which provides for the December 31, 1958, cut-off. While courts do not favor implied repeals, this construction is employed where the conflicting provisions contain a "plain and unavoidable repugnancy."[60] In the case of an amended statute only the parts of the original statute inconsistent with the amended statute are repealed by implication.[61] Under the foregoing principles there is a plain and unavoidable repugnancy between the cut-off dates in the first and second sentences. These two dates, however, are the only inconsistent part; thus, by considering that the words "after April 1, 1958" have been deleted from the first sentence this ambiguity is removed, the rules of construction are satisfied, and the entire provision becomes clear. Furthermore, this agrees with the apparent intent of the legislature. Anyone, therefore, who actively exercised his riparian rights within three years prior to April 6, 1956, or between April 6, 1956 and December 31, 1958, could qualify as a claimant, provided he filed his claim with the Board on or before December 31, 1958.

b. *Priorities Among Prior Users*

The second major problem to arise under the provisions protecting prior users is that of priority. In other words, is there any system of priorities among claimants. Priorities determine who is entitled to exercise his appropriative right when there is insufficient water to satisfy all allocations. The one having the most recent priority date must desist from his diversion first, and the one with the oldest priority may continue after all others have been required to stop. At least this way is the way it works where the priority, as opposed to preference, is based solely on time, whether time of initial appropriation or time of filing, as is the case in Mississippi.

The troublesome section 5956-04(a) makes the only reference to priorities of claims found in the act. Here, after stating the cut-off date as previously discussed, the act declares:

> [A]fter said date of December 31, 1958, claims may be filed with the board, but the priority of all claims will be determined by the date the claim is received by the board.[62]

It must be noted that this provision refers to "all" claims. Thus, the question is whether this word is used in its broadest context.

As noted earlier,[63] a question of constitutionality might well be raised under an allocation law that arbitrarily terminated the rights of those

[60] *Ex parte* McInnis, 98 Miss. 773, 783, 54 So. 260, 262 (1911).

[61] *E.g.*, McAdam v. Federal Mut. Liab. Ins. Co., 288 Mass. 537, 198 N.E. 362, 364 (1934).

[62] Miss. Code Ann. § 5956-04(a) (1956).

[63] See text accompanying n. 46, *supra*.

lawfully diverting water to a beneficial use prior to its passage. The Mississippi statute protects those users and also creates an additional protected group. This latter category is composed of those who initiated their use between the effective date of the act (April 6, 1956) and December 31, 1958. Clearly the question of constitutionality is not the same in both cases, assuming that the question is bottomed on the posture of those exercising their riparian right when the regulatory scheme goes into effect. Therefore, it would be desirable to consider these two groups separately.

The true prior users, those exercising their rights prior to passage of the act, constitute by far the largest category of users. From a total of 1,269 allocations granted, 1,145 allocations were made to this group. This compares with seventeen allocations for the second category of claimants and 107 allocations[64] granted the permitees.[65] Thus, the question of intra-group priority can be extremely critical among the true prior users.[66]

As already shown,[67] the Mississippi act protects the previously exercised rights of the true prior user provided he obtains an adjudication of those rights. After December 31, 1958, no diversions of surface water can be made without authorization by the Board. Therefore, riparian rights are nonexistent unless the claimants are actually exercising them with Board authority.

It is true that the only rights true prior users could protect were riparian rights. The act provides that:

> [I]t is not the intent, however, to validate any claim to the use of water, or for rights of construction looking to the use of water, not lawful on the effective date of this act.[68]

On the effective date of the act all uses of water were controlled by the riparian doctrine.[69] Nevertheless, other provisions of the law which relate to the right of claimants are so repugnant to the riparian doctrine as to compel the conclusion that the statute converts previously exercised riparian rights into something resembling appropriative rights.

One of the fundamental concepts of the riparian doctrine is that the rights of a riparian exist *jure naturae* because of the contiguity of his

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[64] See n. 12, *supra.*

[65] These are the Board's figures at the close of the working day on April 17, 1967.

[66] In fact the situation is critical on Deer Creek which runs through Bolivar, Washington and Sharkey Counties. On this small creek, with limited flow and a length of approximately 164 miles, there are 65 allocations authorizing a total annual diversion of 12,799 acre feet. This does not include diversions from its tributaries. Of these totals, all but eight allocations for 976 acre feet were made to true prior users. These eight allocations were granted members of the second group of claimants.

[67] See text accompanying nn. 46-50, *supra.*

[68] Miss. Code Ann. § 5956-02(g)(3) (1956).

[69] *See, e.g.,* Masonite Corp. v. Windham, 210 Miss. 90, 48 So. 2d 622 (1950).

property to the stream.[70] Obviously the claimant's rights in Mississippi exist, not by the law of nature, but by the law of the State as limited by the State and Federal Constitutions. Furthermore, the cornerstone of the riparian doctrine is a common ownership of, or holding of correlative rights in, the watercourse by the riparians.[71] Yet, in Mississippi, the "control and development and use of water for all beneficial purposes [is] in the State,"[72] a situation that hardly suggests a common ownership or correlative rights among riparians.[73] Equally foreign to the riparian doctrine are provisions calling for the termination or modification of rights by an administrative agency,[74] and prohibitions against changing the point or place of diversion or use of the water without Board consent.[75] Perhaps most persuasive, however, is the definition of "appropriation" which includes those uses made by claimants.[76] It is clear then that this right being considered was first exercised as a riparian right, but is now, for most practical purposes, converted into an appropriative right. That it is essentially a prior appropriative right can hardly be denied, inasmuch as this right is defined as being the right to *continue* the beneficial use of water having been made within the three years immediately preceding the effective date of the act.[77] The question of what it is prior to, however, still remains.

One of the major problems involved in converting from the doctrine of riparian rights to a system of prior appropriation is that of the so-called "vested rights."[78] If these are considered property rights, as they universally are,[79] then surely the fifth and fourteenth amendments to the United States Constitution demand that they be recognized and protected.[80] Typically, a western statute which recognizes riparian rights will contain language to the effect that nothing in the regulatory scheme is to affect vested rights or existing rights.[81] While most acts normally

[70] *E.g.*, 1 FARNHAM § 63.

[71] *E.g.*, HUTCHINS, SELECTED PROBLEMS IN THE LAW OF WATER RIGHTS IN THE WEST 39 (1942) [hereinafter cited as HUTCHINS].

[72] MISS. CODE ANN. § 5956-01(b) (1956).

[73] In light of the argument here being made, it should be pointed out that the act, as originally passed, stated that, "[w]ater occurring in any watercourse, lake or other natural water body of the state, is hereby declared to be public waters and public wealth of the State. . . ." Miss. Laws 1956, ch. 167, § 1(b).

[74] MISS. CODE ANN. § 5956-05 (1956).

[75] MISS. CODE ANN. § 5956-02(g)(2) (1956).

[76] MISS. CODE ANN. § 5956-23(b) (1956).

[77] MISS. CODE ANN. § 5956-02(g)(2) (1956).

[78] *See, e.g.*, 1 FARNHAM § 63.

[79] For a detailed treatment of the subject of riparian rights as property rights see Lauer, *The Riparian Right as Property*, WATER RESOURCES AND THE LAW 131 (1958).

[80] *See, e.g.*, State v. Knapp, 167 Kan. 546, 207 P.2d 440, 448 (1959), *as interpreted* by Baumann v. Smrha, 145 F. Supp. 617, 624 (D. Kan. 1956), *aff'd per curiam* 352 U.S. 863 (1956).

[81] *E.g.*, WASH. REV. CODE § 90.03.010 (1961).

don't define vested rights as fully as does the Mississippi law, they clearly refer to the rights being exercised prior to the enactment or amendment of the appropriation statute.[82] However, there usually is no reference to relative priorities among the protected rights. The classic provision relating to priorities is to the effect that the first user to perfect an *appropriation* has the superior right, or, as it is frequently expressed, "[F]irst in time, first in right."[83] This statement does not clarify whether the protected prior users are subject to priorities within their group.

In some of the western states the protected prior user who exercised his rights as a riparian is considered to remain a riparian, and consequently no system of priorities exists among those prior users. Any conflict among them is resolved under the riparian doctrine. This reasoning could not prevail under the Mississippi law because the riparian character of these rights is no longer recognized. On the other hand, it is doubtful that the act means to establish an order of priority among these claimants. The only statement that the system of priority affects claimants is that priority shall be based on the time the claim is received by the Board. Yet the act allows claimants until December 31, 1958, to file their claims. If all claimants are subject to priority based on time of filing, the ludicrous situation of a claimant prior in time of use being junior in priority to one subsequent in time of use can arise. A typical example of this arose on Bogue Phalia. There, claim number 213, in the amount of 1,424 acre feet annually, was received on February 27, 1957, and claim number 241, in the amount of 2,225 acre feet annually, was received on June 7, 1957. Both were granted in the full amount. Yet, the use claimed under number 213 was commenced on May 1, 1952, and that for number 241 was begun on July 1, 1951.[84] Furthermore, the normal effect of the priority system is to cut off the allocation granted junior appropriators when competition for water becomes severe, as in times of drought. In other words, the senior appropriators will continue to exercise their grant to withdraw in full, while the junior appropriators will be denied the right to divert any quantity.[85] Yet, the Mississippi act specifically defines an appropriation as the right of these true prior users to continue their use of water. Considering this provision of the act, and the constitutional problems involved in allowing one former riparian to continue diverting the full amount of his allocation while cutting off another who actually commenced his use of water before the first one, but who filed his claim with the Board later than the first, although within the time provided by the statute, it is clear that the legislature did not intend for the true prior

[82] *E.g.*, City of Fairbury v. Fairbury Mill & Elevator Co., 123 Neb. 588, 243 N.W. 774 (1932) (construing Neb. Laws 1895, ch. 69 § 49).

[83] *E.g.*, HUTCHINS 326.

[84] See text in n.12, *supra*.

[85] HUTCHINS 327.

users to be subject to priority based on time of filing. Yet, the act makes no mention of claimants' priorities being based on the time of initial diversion or use, but only refers to priority relating to time of filing.[86] The conclusion that there is no priority among the true prior users thus becomes inescapable. In the event of an insufficient supply of water some proration, or purchase of rights,[87] among this group of claimants must be worked out, perhaps in accordance with riparian rules.

The second group of claimants is in a different position insofar as having a property right that must be preserved is concerned. These users commenced their application and diversion after the statute became effective, and if the act is constitutional there is no requirement that it must give them a preferred status. However, this has been done, and there is no indication that their posture is in any way different from that of the true prior user. The only mention in the act of priorities among claimants is the statement in section 5956-04(a)[88] that the priority of all claims will be determined by the date of receipt by the Board. Because this section does not otherwise distinguish the two groups of claimants, it is clear that the legislature intended to put them on the same footing vis à vis priorities. In other words, they are all claimants with an equal right to the use of water provided their claim was received by the Board on or before December 31, 1958.

This leaves open the question of what is meant by the declaration in section 5956-04(a)[89] that the priority of all claims will be based upon the date of receipt by the Board. Immediately preceding that language is a statement that "[A]fter said date of December 31, 1958, claims may be filed with the board. . . ."[90] The sentence proceeds, "[B]ut the priority of all claims will be determined by the date the claim is received by the board." Considered in the light of the foregoing discussion of those who filed their claim on time, it is obvious that the prior user who does not file his claim on or before December 31, 1958, loses the statutory protection made available to him and takes his water allocation subordinate to all claimants and to all priorities senior to his.

2. *Subsequent Users*

The final group of water users, the permitees, are all subject to priority based, apparently, upon time of receipt of the application by the Board.

This is the logical procedure to follow under the doctrine of relation. A typical appropriation procedure under modern statutes requires the

[86] Miss. Code Ann. § 5956-04(a) (1956).
[87] It should be noted that the act grants no condemnation powers.
[88] Miss. Code Ann. § 5956-04(a) (1956).
[89] Miss. Code Ann. § 5956-04(a) (1956).
[90] Miss. Code Ann. § 5956-04(a) (1956).

applicant to: (1) obtain a permit; (2) commence construction of the diversion work within the time prescribed; (3) use reasonable diligence in completion of diversion works; and (4) apply the waters to a beneficial purpose.[91] Under the doctrine of relation, the priority relates to the date of the first statutory step,[92] or, under the typical procedure outlined above, the date of applying for the permit.

Under the Mississippi act any person intending to acquire an appropriative right must make application to the Board for a permit to make such appropriation.[93] The Board endorses upon the application the date of receipt. In the event further information regarding the proposed appropriation is needed, the Board requests it, but the act specifically provides that the application shall not lose its "priority of filing" because of such request, provided the needed information is given within thirty days or such extension of time, up to one year, as the Board may grant.[94]

This is significant because the act does not specifically state that any system of priorities exists for the permitees. However, in the above cited section it refers to priority of filing, indicating that permitees are subject to priority based upon time of filing. Furthermore, the act subjects claimants who filed after December 31, 1958, to such a system of priorities. There would be no advantage in setting up one system of allocating water rights for tardy claimants while another system is employed for applicants, and such a procedure would result in an administrative nightmare. Therefore, it is clear that permits are issued according to a priority determined by the date of filing the application with the Board.

This system is in keeping with the doctrine of relation. After the Board approves an application, it issues a permit authorizing the applicant to proceed with the construction of his diversion works and all other steps necessary to perfect his appropriation.[95] The permitee shall notify the Board within sixty days after the completion of the construction of the diversion works and the application of water to the proposed use, provided that the construction and application are completed within the time allotted by the Board in the permit. If the works have been completed and the appropriation perfected in accordance with the approved application, the Board shall then issue a license to appropriate.[96] The license, of course, would bear the same priority as the permit through which it was obtained.

All priorities are based upon time of filing with the Board. Protected prior rights are based upon time of initial use, and they are

[91] *See* Bouldin, *Perfection and Loss of Appropriation Rights,* PROCEEDINGS, WATER LAW CONFERENCES, University of Texas, 226, 228 (1954).

[92] *E.g.,* HUTCHINS 75.

[93] MISS. CODE ANN. § 5956-16 (1956).

[94] MISS. CODE ANN. § 5956-17(a) (1956).

[95] MISS. CODE ANN. § 5956-18(a) (1956).

[96] MISS. CODE ANN. § 5956-19 (1956).

dependent upon timely filing with the Board; but there are no priorities among the holders of these rights, and there are no preferences other than domestic users.

B. *Preferences*

A preference, which is not to be confused with a priority, is a legislative or administrative determination that one type of use, or specific project, is preferred over another. Generally preferences, where found, fall into one of three classes. The first takes the form of condemnation power for certain purposes, such as municipal water supply. The second is the "true" preference which simply means that the junior appropriator having the benefit of this preference moves up the priority list above more senior appropriators not having it. Thus, when the water supply falls short of the demand, these senior appropriators are required to cease the application of water while the junior continues. The final class of preference is preference in granting permits. Here when the agency administering the law is faced with competing applications, all of which can't be granted, it will grant the one which promises to return the greatest net benefit, even though it may not be the first received.[97] Some statutes specify the order of preference[98] while others leave it within the Board's discretion to grant the application that will result in the greatest beneficial use.[99]

The Mississippi act carries no provisions for preferences other than for domestic use. The domestic user has a right with which the act does not interfere, and it is not mandatory that he submit an application.[100] Beyond that, the Board is directed to approve all applications made in such form as will meet the requirements of the act and such rules and regulations as the Board shall promulgate, provided the proposed use is for beneficial purposes and does not prejudically and unreasonably affect the public interest.[101]

"Beneficial use" is defined as the application of water to a useful purpose that inures to the benefit of the user.[102] This definition indicates that social or general economic considerations do not override the principles of water conservation and the establishment of a system of firm water rights. It is true that in some instances statutory prohibitions against granting applications that would be contrary to the public interest have been construed as authorizing some discretion in preferring one

[97] *See generally* Trelease, *Preferences to the Use of Water*, 27 Rocky Mt. L. Rev. 133 (1955).

[98] *E.g.*, Tex. Rev. Civ. Stat. Ann. § 7471 (1954).

[99] *E.g.*, Utah Code Ann. § 73-3-8 (1953).

[100] Miss. Code Ann. § 5956-04(a) (1956).

[101] Miss. Code Ann. § 5956-07 (1956).

[102] Miss. Code Ann. § 5956-02(e) (1956).

project or application over another,[103] but it is unlikely that this reasoning would be valid under the Mississippi act in view of the definition of beneficial use and the abundance of water resources in this state.

V. Loss of Rights

Aside from prescription, there are two principles under which water rights may be lost—abandonment and forfeiture. Although the courts occasionally tend to confuse the two, they are quite distinct principles with marked differences between them.

Abandonment is the relinquishment of the possession of property without the present intention of repossessing it. This requirement for concurrence of act and intent means, in the water field, that neither the intention to abandon the right, unaccompanied by cessation of use, nor mere non-use alone, will constitute an abandonment.[104] There must be an actual non-use plus an intention to effectively relinquish all rights to the water.

Courts are reluctant to decree an abandonment,[105] thus statutory forfeiture is provided for in fifteen of the western states.[106] Forfeiture is the loss of the water right due to non-use for a prescribed period of time, usually three[107] or five[108] years.[109] Under the theory of forfeiture no intention to forfeit or abandon the right is necessary. The acts necessary for forfeiture are complete when the appropriator has failed to use the water for the statutory period.

The Mississippi act provides for forfeiture of the water right after the permitee:

> [C]eases for three (3) consecutive years to use it for the specific beneficial purpose authorized in his permit or license . . . ,

but the Board may, upon his application, extend the stated period.[110] It must be noted that this provision refers only to those purposes authorized in the *permit* or *license,* thus, forfeiture does not apply to rights

[103] *E.g.*, Young & Norton v. Hinderlider, 15 N.M. 666, 110 Pac. 1045 (1910).

[104] *E.g.*, Utt v. Frey, 106 Cal. 392, 39 Pac. 807 (1895).

[105] *E.g.*, Hutchins 390.

[106] The only jurisdictions without statutory forfeiture are Colorado, Hawaii, and Washington, whose Codes are silent on this aspect of the loss of rights, and Montana whose statutes provide for loss through abandonment. Alaska and Texas provide for both.

[107] *E.g.*, S.D. Code § 61.0139 (1939).

[108] *E.g.*, Ariz. Rev. Stat. Ann. § 45-101(c) (1956).

[109] The various time periods, and the states prescribing each, are: three years, California, Kansas, Nebraska, North Dakota, and South Dakota; four years, New Mexico; five years, Alaska, Arizona, Idaho, Nevada, Oregon, Utah, and Wyoming; seven years, Oklahoma; and ten years, Texas.

[110] Miss. Code Ann. § 5956-06 (1956).

evidenced by an Order of Determination. In other words, the rights of subsequent users are subject to forfeiture and those of prior users are not.

The foregoing recognizes two distinct possibilities as forfeiture situations; first, where *no* beneficial use of the water is made for three consecutive years, and, second, where the permitee for a period of three consecutive years applies the water to some purpose other than that specifically authorized in his permit or license.[111]

The first instance is the typical forfeiture provision. Although it is simple, it does present the question of whether forfeiture is to be applied when the non-use is due to factors beyond the appropriator's control. This problem arises generally when drouth or some other circumstance renders diversion impossible. In these cases the courts hold that mere non-use alone is insufficient to work a forfeiture.[112] Because irrigation accounts for the great majority of the allocations in Mississippi,[113] and because, due to normally abundant rainfall, most irrigation here is supplemental irrigation, the failure to use the water under this act will not often be due to drouth. On the other hand, there will be years in which there is nothing to be gained economically by irrigating. In fact, under certain circumstances irrigation can reduce crop yields.[114] In these cases, while it is physically possible to irrigate, it is not possible to do so economically. It should be noted that forfeiture occurs when the water is not applied to the "beneficial purpose" authorized in the permit or license. Since beneficial use is defined in terms of benefit to the user, it is obviously impossible, because of an abundance of rainfall, to apply the water to a beneficial use in some years. Also, the definition of beneficial use specifically excludes the waste of water,[115] which is what an uneconomical application of water constitutes. Thus, there should be no forfeiture when the non-use of the water is due to sufficient rainfall.

The foregoing does not mean that where the full amount of the allocation is never used the allocation cannot be modified. If a regulatory agency can terminate an allocation in full, it can do it in part also.[116] The Mississippi act provides that "[U]pon good cause shown, the board may modify or terminate any appropriation at any time."[117] The authority is clearly there. This means that if the appropriator has an allocation for a greater amount than he can use, the permit can be modified, depriving him of the excess above his actual needs.

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[111] This second possibility may also invite penal sanctions. See MISS. CODE ANN. § 5956-23(b) (1956). This will be discussed later in this article.

[112] *E.g.*, Huffner v. Sawday, 153 Cal. 86, 94 Pac. 424 (1908) (drouth); Ramsay v. Gottsche, 51 Wyo. 516, 69 P.2d 535 (1937) (ditches destroyed by extraordinary flood).

[113] About eighty-one percent of the allocations are for purposes of irrigation.

[114] MISS. AGRICULTURAL EXPERIMENT STATION BULLETIN 669 at 13 (1963).

[115] MISS. CODE ANN. § 5956-02(e) (1956).

[116] *In re* Birdwood Irr. Dist., 154 Neb. 52, 58, 46 N.W.2d 884, 888 (1951).

[117] MISS. CODE ANN. § 5956-05 (1956).

Rights to water, however, may be lost by failure to use it for the "*specific* beneficial purpose authorized in [the] permit or license" (emphasis supplied) for a period of three consecutive years.[118] While this language seems to be unique to the Mississippi statute, it is, nevertheless, quite clear. Not only must the water be used almost continuously, it must be used for the specific purpose authorized. The reason for this is obvious.

The critical problem in water allocation is not the amount to be withdrawn from the stream, rather it is the amount by which stream flow will be diminished. Several factors affect this problem, including ground water recharge, quantities diverted, and the portion of that quantity diverted which will ultimately return to the watercourse as either seepage or surface runoff. Obviously, some applications of water result in less return to the stream than do others. As an example, irrigation will probably return much less water to the stream than will most manufacturing processes.

When a permit is issued, it contains a specific statement defining the purpose for which the allocation is granted. These purposes are domestic, industrial, irrigation, municipal, recreation, fish culture, and "other." Beyond that, there is no further breakdown. In other words, a permit to irrigate doesn't designate whether cotton or pasture is to be irrigated, nor does an industrial allocation specify whether the water is for producing paper pulp or hydroelectric power.[119] Therefore, under the act, forfeiture occurs if one holding an irrigation permit utilizes the water for raising fish for three consecutive years, but it does not occur if he changes from irrigating cotton to irrigating beans.[120]

In addition to the forfeiture section the act has two other provisions dealing directly with the loss of rights. Section 5956-05 states:

> No water appropriation acquired pursuant to law shall be declared forfeited and surrendered except by a court of competent jurisdiction as other property rights are determined. Provided, however, upon good cause shown, the board may modify or terminate any appropriation at any time.[121]

Then, after charging the Board with the duty of ascertaining the rights of those using water on the effective date of the act, and of making

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[118] MISS. CODE ANN. § 5956-06 (1956).

[119] However, this information must be supplied to the board before an allocation will be granted.

[120] Of course a partial forfeiture would take place if he changed from irrigating rice to irrigating cotton because the rice irrigation allocation is four times as great, per acre of land, as is the cotton irrigation allocation, and it is doubtful if the latter would be fully utilized.

[121] MISS. CODE ANN. § 5956-05 (1956).

such findings the subject of an order of determination, section 5956-13(c) states:

> The order of determination of the board shall be in full force and effect from the date of its entry in the records of the office of the clerk of the chancery court until its operation shall be stayed by an order of a court of competent jurisdiction.[122]

These three sections must be considered in the context of which category of users they affect.

Section 5956-05[123] refers to "appropriations," which by definition includes both claimants and permitees.[124] The first sentence of the section appears to mean that the Board is powerless to adjudicate on abandonment or forfeiture, but that this must be done by a court of competent jurisdiction as would be true in the case of loss of land by prescription. (It should be noted that the fact the statute provides for forfeiture does not necessarily preclude an abandonment.)[125] This leaves the Board power to act in an emergency such as instances of insufficient water to supply all appropriators from a given watercourse. While it may seem an exercise in semantics to consider that apportioning a limited supply of water among claimants, or directing a junior appropriator to cease the exercise of his right during a drouth, is modifying or terminating an appropriation, this apparently is the case. Appropriation is the right to use a specific quantity of water at a specific time,[126] or to continue a use previously initiated.[127] Certainly, if one is denied the right to use this water at the specified time or must curtail the use previously initiated, his appropriation has been either terminated or modified for the year or season in question. It would seem that section 5956-05[128] gives the Board this power and the duty to exercise it, but it does not grant the Board power to adjudicate forfeitures and abandonments.

The forfeiture provision, section 5956-06,[129] expressly refers to those beneficial purposes authorized by the permit or license. Because permits and licenses are granted to applicants and not to claimants,[130] this means that forfeiture does not work against prior users who filed for an adjudication of their prior use on or before December 31, 1958. This

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[122] Miss. Code Ann. § 5956-13(c) (1956).

[123] Miss. Code Ann. § 5956-05 (1956).

[124] Miss. Code Ann. §§ 5956-02(g)(1) through (3) (1956).

[125] Hutchins 395.

[126] Miss. Code Ann. § 5956-02(g)(1) (1956).

[127] Miss. Code Ann. § 5956-02(g)(2) (1956).

[128] Miss. Code Ann. § 5956-05 (1956).

[129] Miss. Code Ann. § 5956-06 (1956).

[130] *Compare* Miss. Code Ann. §§ 5956-18 and 5956-19 (1956), *with* Miss. Code Ann. § 5956-13 (1956).

does not mean, however, that abandonment will not work against these users, but such must be decreed by a court.

All of section 5956-13[131] relates to the determination of the rights of claimants. This is made the subject of the order of determination referred to in the above quoted provision. This portion of the act does not mean that the Board cannot modify the appropriation of a prior user as previously discussed. Certainly, if there is not enough water available to fully satisfy the appropriation of each claimant from a given watercourse, the abstract right to the water cannot be exercised. Some authority must be in a position to act, and the court designated in sections 5956-05[132] and 5956-13(c)[133] would, in all likelihood, be unable to act in time. The Board of Water Commissioners, under the authority of section 5956-05,[134] is the agency which makes whatever adjustment is needed. Therefore, the statement that the order of determination shall remain in full force and effect until its operation is stayed by a court of competent jurisdiction, should not operate to divest the Board of this power.

The order of determination grants no rights and creates no appropriations. It applies only to prior users, and their rights are granted by the statute itself.[135] It creates no appropriation, for the claimant's appropriation exists by operation of law[136] provided he filed his claim in sufficient time. The order is nothing more than evidence of a determination of the extent of those rights granted each individual by the statute.[137] The operation of the order of determination does not differ from the operation of any other evidence of a right, such as a permit under this statute or a deed. Thus, this section means that the order of determination shall operate in full force and effect as the evidence of a right, and the extent thereof, until stayed by a court of competent jurisdiction. At the same time the Board may still exercise its powers under section 5956-05.[138]

The final method for losing water rights to be considered is that of prescription. This might also be considered a method of acquiring rights. The western states are divided on the question of whether water rights may be gained or lost by prescription, although the result is frequently controlled by peculiarities or express declarations within the statutes.[139] An example is found in Idaho where the statute on adverse possession

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[131] MISS. CODE ANN. § 5956-13 (1956).
[132] MISS. CODE ANN. § 5956-05 (1956).
[133] MISS. CODE ANN. § 5956-13(c) (1956).
[134] MISS. CODE ANN. § 5956-05 (1956).
[135] MISS. CODE ANN. § 5956-04(a) (1956).
[136] MISS. CODE ANN. § 5956-02(g)(2) (1956).
[137] MISS. CODE ANN. § 5956-13 (1956).
[138] MISS. CODE ANN. § 5956-05 (1956).
[139] *Compare* KAN. STAT. ANN. § 82(a)-705 (1964), *with* N.D. CENT. CODE § 61-04-22 (1960).

refers to realty rather than land,[140] and realty is defined as including those things appurtenant to the land.[141] There it was held that, since water rights were appurtenant to the land, they were subject to being acquired or lost by prescription.[142]

The Mississippi act does not specifically mention prescription. However, it does state that:

> [N]o right to appropriate or use water subject to appropriation shall be initiated or acquired except upon compliance with the provisions of this act. . . .[143]

Those waters "subject to appropriation" include all waters subject to regulation by the act.[144] The provisions of the act, of course, deal only with rights obtained by claims, applications, and the few exceptions previously discussed. This seems to be a clear declaration against the losing or gaining of appropriative rights by prescription.

Furthermore, Mississippi's non-statutory water law indicates that the court did not recognize proprietary rights in water.[145] If there is no proprietary right in water, then there can be no adverse possession nor prescription because both relate to such rights.[146] While the Mississippi court has not been called upon to rule on this point, it has not extended the provisions of the adverse possession statute[147] (which speaks of claims to ownership of *land*) to water rights. It has extended the definition of land no further than to soil, minerals,[148] clay, oil,[149] and the natural product of the land such as trees.[150] It cannot be said that any of these cases (some of which do not deal with adverse possession) indicate that surface water is "land" in the contemplation of the statute.

Thus, appropriative rights may be lost or modified through forfeiture, abandonment (probably), action of the Board for good cause shown, and by order of a court of competent jurisdiction. However, these rights are not subject to loss by adverse possession or prescription.

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[140] IDAHO CODE ANN. § 5-206 (1948).

[141] IDAHO CODE ANN. § 55-101 (1948).

[142] Pflueger v. Hopple, 66 Idaho 152, 156 P.2d 316 (1945).

[143] MISS. CODE ANN. § 5956-04(a) (1956).

[144] MISS. CODE ANN. § 5956-01(b) (1956).

[145] *See, e.g.*, Clarke County v. Mississippi Lumber Co., 80 Miss. 535, 31 So. 905 (1902), where, in a ground water case, the court applied the rule of capture to the non-ownership theory.

[146] THOMPSON, REAL PROPERTY § 2554 (1957) [hereinafter cited as THOMPSON].

[147] MISS. CODE ANN. § 711 (1956).

[148] Whelan v. Johnston, 192 Miss. 673, 6 So. 2d 300 (1942).

[149] Stern v. Great Southern Land Co., 148 Miss. 649, 114 So. 739 (1927).

[150] Dantzler Lumber Co. v. State, 97 Miss. 355, 53 So. 1 (1910).

VI. Changes in the Allocation

Once an allocation has been made, the appropriator can change neither the place of diversion nor the use without the express consent of the Board.[151] Making such an unauthorized change is a misdemeanor punishable by a fine of not more than two hundred dollars.[152] In the West sometimes the rule is that an appropriator can change the place of diversion or use, or both, provided he does not injuriously affect the rights of others or increase the amount of his diversion.[153] Of course, the prohibition against injuriously affecting the rights of others will virtually rule out any change of place or use or diversion which results in a significantly reduced return flow. This, however, is not a universal restriction.

It has been held in Wyoming that, where the appropriation is not for use on a specifically designated tract of land, the appropriator may change the place of use even though the result is a greater permanent diminution of stream flow.[154] In this instance the appropriation was for the irrigation of ninety acres. Subsequent to the appropriation Wyoming passed an act prohibiting the detachment of water rights from the place for which they were acquired without loss of priority.[155] Also, prior to the statute the Wyoming court had upheld the sale of a portion of a water right by one ditch company to another where the vendee's headgate was downstream from the vendor's, and both were downstream from the plaintiff, and where it further appeared that the vendor's irrigated acreage was reduced by about 350 acres, while the vendee's was increased by 180.[156] The court in the principal case reasoned that if a water right could be sold and transferred, it was logical that it could be transferred to other lands of the appropriator without sale where the appropriator was not limited to use on designated acreage. Furthermore, since a water right was a property right, no statute subsequent to the appropriation could divest the appropriator of the right to the full utilization of his property, even where such utilization involves a change of place of use which injures a junior appropriator.[157]

It is to be noted that this particular fact situation cannot arise under

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[151] Miss. Code Ann. § 5956-23 (1956).

[152] Miss. Code Ann. § 5956-23(b) (1956).

[153] *E.g.*, Fuller v. Swan River Placer Mining Co., 12 Colo. 12, 19 Pac. 836 (1888).

[154] Hughes v. Lincoln Land Co., 27 F. Supp. 972 (D. Wyo. 1939).

[155] Wyo. Stat. Ann. § 41-2 (1957). The statute, in its present form, contains no loss of priority or other penalty provision. This deletion, however, was subsequent to the principal case.

[156] Johnston v. Little Horse Creek Irrigation Co., 13 Wyo. 208, 79 Pac. 22 (1904).

[157] For a critical study of restrictions on the transfer of water rights *see* Trelease & D. Lee, *Priority and Progress—Case Studies in the Transfer of Water Rights*, 1 Land & Water L. Rev. 1 (1966).

the Mississippi act because the limited-transferability provision[158] has been in the law since its inception. A similar problem could possibly be presented by the case of a claimant wanting to change the place of use of his water.

The claimant, prior to the effective date of the act, was a riparian. Due to the safeguards given the rights of these users the legislature clearly felt that they had property rights which must be protected. These were the rights of a riparian. While the riparian cannot effectively sever his right from the land and convey it to others,[159] and while the right must be used on riparian land,[160] there is no prohibition against changing the place of use on his riparian land. Is this an incident of the property right the legislature sought to protect? If so, there is no logical reason for restricting transferability on the part of the claimant at all, for no one under the statute is limited to the use of water on riparian lands only. Yet, if the construction suggested prevails, the result could be the extraordinary situation of an irrigator being able to transfer his claimed allocation anywhere on the front forty he wishes because it is all riparian, but not being able to transfer his permitted allocation on the back forty because it is not, even though they are both being used in the same eighty acre field.

Obviously, all allocations should be transferable or, alternatively, none should be. The first possibility is out because the statute prohibits it. The second possibility then is the proper construction, provided the protection of prior users does not prohibit it. A closer look at the protected right is in order.

> The act guarantees no more than:
> [T]he right to continue the use of water having actually been applied to any beneficial use at the time of the effective date of the act.[161]

This was a riparian use. The riparian use, however, is limited by protection of the natural flow or the concept of reasonableness.[162] The riparian's right, therefore, is not an unlimited right to divert water, but is a right limited by the reasonable needs of others. If a riparian is using his water in such a manner that two-thirds of it returns to the watercourse, he should no more be allowed to change his place of use so that

[158] This is not a non-transferability provision because transfers can be made upon obtaining board authorization.

[159] *E.g.*, Duckworth v. Watsonville Water & Light Co., 158 Cal. 206, 110 Pac. 927 (1910). (The conveyance is good as between the parties thereto, but not as to objecting third parties with standing to object.)

[160] MARTZ § 28.55 at 159.

[161] MISS. CODE ANN. § 5956-02(g)(2) (1956).

[162] See text accompanying nn. 23 & 24, *supra*.

only one-third returns to the watercourse than he would be allowed to double his rate of diversion on the original location with the same fractional return flow. The ultimate result is the same in either instance—a one hundred percent increase in stream depletion. Furthermore, the riparian's right is not a right to any specific quantity of water.[163] Although the courts and text writers seldom, if ever, express it thusly, a riparian's right is only a right to deplete stream flow by an uncertain amount, which is determined by the needs of the community and the policy of the state. Therefore, the claimant comes under the Mississippi act with a right circumscribed by the state policy and the rights of others, and more recognizable as a limitation on what he can do (decrease stream flow), than as a declaration of what he can do (divert a quantity of water.)

The policy of the State of Mississippi is water conservation[164] and protection of minimum stream flow[165] and lake level.[166] To effectuate this policy it is essential that the Board have veto power over any changes in use that might adversely affect state policy. Viewed in this light, the former riparian does not have a right to change his place of use which is superior to the Board's veto power over such change. All of the foregoing reasoning is equally valid with regard to changes of place of diversion.

Thus far, transferability has been considered in the context of changes in the place of diversion or use of the water. Equally important is the question of the power to convey water rights regardless of whether these other changes are involved.

The act does not limit per se conveyances of the right. While it states that appropriation of water shall not constitute absolute ownership of the water, this ownership is specifically qualified only by the concept of beneficial use.[167] Unless a statute expressly prohibits the sale of a water right, it should be freely alienable so as to allow maximum beneficial use of the water. This means maximum benefit to both the user and the community.

The sale value, if any, of a water right confers a benefit upon the owner of the right provided he is allowed to rely upon it. One of the most valid arguments against the system of prior appropriation is that it tends to freeze water use patterns, thereby preventing the realization of the maximum benefits reasonably possible from the application of water.

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[163] *E.g.*, Prather v. Hoberg, 24 Cal. 2d 549, 150 P.2d 405 (1944).

[164] MISS. CODE ANN. § 5956-01(a) (1956).

[165] MISS. CODE ANN. § 5956-04(c) (1956).

[166] MISS. CODE ANN. § 5956-04(d) (1956).

[167] MISS. CODE ANN. § 5956-07 (1956). Of course other provisions, such as the prohibition against change of place of diversion or use, illustrate that this ownership is less than absolute, but they do not severely limit it, and provide no basis for reading limitations not stated into the statute.

Free alienation of water rights, coupled with power to change the place of use or diversion and power to change the type of use go a long way toward answering this objection.[168] As the demand for water increases, flexibility in the use or conveyance of a water right becomes more essential for community growth, development and progress. Thus, the policy of the State of Mississippi in regard to water resources and the absence of any prohibition within the act against alienation of the water right leads to the conclusion that they may be freely bought and sold.[169]

The conclusion that a water right may be sold leaves questions of conveyancing to be answered. Specifically, how is a water right effectively conveyed?

Under the Mississippi statute a water right appears to be appurtenant to the land.[170] Therefore, a conveyance of the land is an effective conveyance of the appurtenant right, unless the right is expressly reserved.[171] Accordingly, it need not be specially mentioned in the deed to the land in order to convey the water right. Because the place of use cannot be changed without permission of the Board, a reservation of the water right unaccompanied by authorization to make a change in the place of use would be meaningless. Not only could a permitee lose the reserved right under the forfeiture section,[172] but the creation of a situation wherein the appropriator cannot lawfully exercise the right at all might well constitute an abandonment.[173]

A caveat is in order here. The act does not insist that a claim or application designate a specific field or fields upon which the water is to be used. Thus, a permit or order of determination may authorize the use of water on all of Blackacre even though the quantity allocated is sufficient to irrigate only a small portion thereof. Accordingly, if an appropriator conveys part of Blackacre he should specifically reserve the water right if he intends to use it on the land retained. Otherwise, litigation over the question of whether a proportionate part (or possibly all) of the water right was conveyed by the deed to the land might ensue.

[168] These do not completely remove all vestiges of rigidity any more than they would in regard to the freezing of land use patterns. To insure as complete a flexibility as is reasonably possible in water use patterns the law should at least include broad powers of eminent domain or condemnation, specific taxation of the water right, and a workable system of measuring and reporting the quantities diverted. Undoubtedly many other practices could be adopted which would make it unprofitable to own a water right that is not being fully or economically utilized.

[169] The author recognizes that under present conditions of hydrology and water use—simply supply and demand—there is today no market for water rights in Mississippi. This situation, whereby water is a free good, cannot be expected to last forever.

[170] This conclusion is due, in part, to the limitations on changing the place of use of water.

[171] 1A THOMPSON § 262 at 322.

[172] See text accompanying nn. 106, 107, 114-16, *supra.*

[173] See text accompanyiny n.100, *supra.*

Inasmuch as the appropriative right may be conveyed by deed to the land, there is no reason it cannot be conveyed independent of the land, provided proper authorization for change of place of use or diversion has been obtained. Even though the right is appurtenant to the land, it is not an inseparable appurtenance; therefore, it can be severed from one tract and transferred to another.[174] Naturally, it then becomes appurtenant to the receiving land.

The first problem to arise under the principle of alienability of the water right is that of the mode or sufficiency of the conveyance. Underlying this problem is the Statute of Frauds. In Mississippi the statute applies to "sale of land, tenements, or hereditaments."[175] The terms "tenements" and "hereditaments" embrace every species of real property, corporeal or incorporeal,[176] thus the conveyance of an appropriative water right comes within the terms of the statute. Where the water right is conveyed with the land, the sufficiency of the deed will determine the sufficiency of the conveyance of the water allocation, and the latter need not be mentioned. However, if the grantor of the land wishes to reserve the water allocation, it must be spelled out in the deed, inasmuch as reservations are affected by the statute to the same extent as are sales.[177]

The problem of sufficiency of the description should not be too great. The permits and orders of determination issued by the Board all contain the name of the appropriator, the file number, the source of water, a description of the land upon which it is to be used, the maximum rate of withdrawal, and the maximum quantity which may be withdrawn. Additionally, the permit gives the priority date of the allocation, and the order of determination states the date upon which the water was initially used. Since permits or orders of determination sufficiently define the water right held by the appropriator, there is no reason why the foregoing information should not constitute an adequate description of the right being conveyed. Actually, even less information should suffice. Recordation of both licenses[178] and orders of determination[179] is required under the act. As a matter of practice the Board also has permits recorded. In view of the innumerable instances wherein the courts have approved intrinsically indefinite descriptions,[180] it would seem that a reference to

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[174] HUTCHINS at 386.

[175] MISS. CODE ANN. § 264(c) (1956).

[176] 5A THOMPSON § 2621 at 845.

[177] 6 THOMPSON § 3103.

[178] MISS. CODE ANN. § 5956-19 (1956).

[179] MISS. CODE ANN. § 5956-13(c) (1956).

[180] *E.g.*, Moffett v. International Paper Co., 243 Miss. 562, 139 So. 2d 655 (1962) (all grantor's property in a certain state); Humes v. Krauss, 221 Miss. 301, 316, 72 So. 2d 737 (1954) (description by reference to adjoining property); Beasley v. Beasley, 177 Miss. 522, 171 So. 680 (1937) ("I.P. Beasley Old Home Place"); Stewart v. Cage, 59 Miss. 558 (1882) (description by reference to source of title).

either the permit or order of determination identifying the original appropriator, file number, date of issuance and recording data should be a satisfactory description of the property conveyed.

Aside from the sufficiency of description there is the question of the sufficiency of the writing per se. Again, so long as the right is conveyed with the land, the sufficiency of the deed as a conveyance of land should control. Where the water right is severed and conveyed independently of the land, it would still seem that, so long as the property is sufficiently described, those additional recitations necessary to the validity of a deed to land would effectively pass title to the right.

Because Board authorization is necessary to change the place of use, any conveyance of a severed water right must be accompanied by some written request for and approval of the change, and these documents will be filed in the office of the Board. This might constitute a sufficient writing to satisfy the Statute of Frauds. A written memorandum of sale prepared by an auctioneer[181] or broker[182] who conducted the sale satisfies the statute even though not executed by the grantor. This rule is based on the theory that the auctioneer or broker acts as agent for both parties, and all presumptions are against any fraud in the sale. This same theory has been applied in holding that a sheriff's sale of land is outside the Statute of Frauds.[183] However, the correct principle is that a sheriff's sale is outside the Statute of Frauds because he is a sworn officer of the law with clearly defined duties, and the presumption is that he properly discharged his duty.[184] His return is merely compliance with statutory requirements.

If the Board members be considered sworn officials of the state with clearly defined duties, a conveyance of severed water rights approved by the Board might be outside the Statute of Frauds. More logically, however, the Board acts as the agent of both parties in such a transfer, and its records constitute a sufficient writing, provided the grantor and grantee are identified and there is some recitation of consideration. However, satisfaction of the Statute of Frauds is not satisfaction of the recording statute.

As previously stated,[185] the act requires all allocations to be recorded when initially granted. Licenses must be recorded as are "other instruments affecting real estate,"[186] while the statute is silent regarding where the chancery clerk shall record orders of determination.[187] Obviously,

[181] Jelks v. Barrett, 52 Miss. (4 H. & S.) 315, 322-23 (1876).
[182] Hinde v. Whitehouse, 7 East 558, 103 Eng. Rep. 216, 221 (*K.B. 1806).
[183] Endicott v. Penny, 22 Miss. (14 S. & M.) 144, 157 (1850).
[184] Hand v. Grant, 13 Miss. (5 S. & M.) 508, 512 (1845).
[185] See text accompanying nn. 164, 165, *supra*.
[186] Miss. Code Ann. § 5956-19 (1956).
[187] Miss. Code Ann. § 5956-13(b) (1956).

they shall also be recorded as instruments affecting real estate, for the one cannot be treated as pertaining to realty and the other as pertaining to chattels.

While the recording statutes[188] specifically apply to "land" or "lands," and while the court has not been called upon to define these words, it would be an unusual situation that demanded the recording of initial allocations, but not of conveyances thereafter. Furthermore, if the licenses and orders must be filed as "other instruments affecting real estate," the interest conveyed should be considered as "land" or "lands" for recording purposes. Thus, the grantee of an appropriator should, to protect his interest, have the instrument of conveyance recorded. When a severed water appropriation becomes appurtenant to land in a county other than the one wherein it was originally filed for record, the grantee should have the instrument of conveyance recorded in both counties.

VII. Appeals

The foregoing discussion shows that the Board is vested with broad powers in granting allocations, modifying or terminating them, and approving changes in place of diversion or use. The decisions of the Board are, in all instances, appealable to the Circuit Court of the county wherein the point of diversion is located by any party aggrieved by the ruling.[189] The appeal may be on factual or legal grounds or both. Testimony may be offered in the Circuit Court, which allows a trial de novo.[190]

In order to perfect an appeal, the aggrieved party must serve the chairman or someone designated by the Board written notice of the appeal, including the grounds therefor, within sixty days after receipt of written notice of the order being appealed.[191] Herein lies a problem. The act provides that no application for a permit may be granted until the substance of the application shall have been published in a newspaper having general circulation in the county wherein the point of diversion is located, at least ten days prior to the granting of the application.[192] On the day the application is to be heard, any party who may be adversely affected if it is granted may appear and contest the application. This notice provision is bothersome even though it is probably valid. The trouble with it is that it insures notice only in the county wherein the point of diversion is located and not in any downstream counties.

The real problem with appeals arises because, while notice is required of hearings on applications, it is not required of hearings on claims. Therefore, it cannot be said that one who objects to the granting

[188] Miss. Code Ann. §§ 867-68 (1956).
[189] Miss. Code Ann. § 5956-25(a) (1956).
[190] Miss. Code Ann. § 5956-25(a) (1956).
[191] Miss. Code Ann. § 5956-25(a) (1956).
[192] Miss. Code Ann. § 5956-18(a) (1956).

of a claim is estopped from complaining if he did not appear to contest it and then follow up with an appeal. He cannot be estopped because he had no notice of the hearing in the first place.

Of course the aggrieved party's grounds for objection to the claim would be severely limited. He cannot complain that his rights would be adversely affected by honoring the claim since the rights of one claimant are not superior to those of another and since the Board cannot reject a claim on grounds of its effect on others. However, two real grounds for objection do exist. First, if the climant's use was not lawful on the effective date of the act, it cannot be recognized by the Board.[193] Thus, if an unlawful use, such as diverting water beyond the watershed, is claimed, it cannot legally be approved. Nevertheless, it is possible that such a claim has been received and approved without protest. Second, it is always possible that a claim containing false information has been acted upon favorably.[194]

It seems clear that the appeal should not be dismissed on motion merely because it is not timely. Thus, there is a serious question concerning the status of any claims improperly approved. The first claims were received and acted upon approximately eleven and one-half years ago, and the last day for filing them was approximately nine years ago. The age of these claims further aggravates the problem if it ever materializes.

If the use claimed was unlawful, or the information given was false, then obviously no valid right is evidenced by the Order of Determination. This being true, the issue then becomes one of whether the claimant's subsequent exercise of the order has resulted in the acquisition of a right that cannot now be divested. About the only way such a right could have been perfected is through adverse possession. It has already been concluded that such rights do not exist under the current state of Mississippi's water law.[195]

Assuming *arguendo* that these rights exist under Mississippi law, it is still doubtful that such a defense could be successfully maintained. The appropriate statute to proceed under establishes a ten year adverse possession requirement.[196] To meet this requirement, the claimant would have to fully exercise his right for ten consecutive years.[197] Since most

[193] Miss. Code Ann. § 5956-02(g)(3) (1956).

[194] These are merely possibilities, and are not to be construed as suggestions by the author that such has happened, nor as a criticism of the Board's methods of operation which the author found to be excellent.

[195] See text accompanying nn. 124-135, *supra*.

[196] Miss. Code Ann. § 711 (1956). Actually in this context we are referring to adverse "use" rather than adverse "possession."

[197] Of course, he could partially exercise his right for this time period and perhaps establish an adverse claim to an amount less than that reflected by the Order of Determination.

claimants are irrigators, and since Mississippi normally has abundant rainfall, it is doubtful that many have used water so extensively. But even if they have, this defense is still incomplete. It would then be necessary to show that the claimant's use deprived the particular protestant of water he would have otherwise used. It is insufficient to show that the water was used, or that stream flow was decreased to the point that no water was available to the complaining user. The proof must go further and show that he would have used the water each of ten consecutive years but for the unlawful diversion.[198]

It should be observed that the foregoing requirements for prescriptive rights apply only where the adverse use is lawful on its face as in the situations under consideration here. The requirement for actual harm to the complaining user is not necessary where the adverse use is patently unlawful, as in the case of diverting without a permit or other authority.[199]

Thus, there is a possibility that some void Orders of Determination are being exercised in Mississippi today. If so, any party harmed thereby should be allowed to appeal the issuance of those orders if he did not receive proper notice of the hearing on them. The one holding such an order should not be allowed to interpose a defense of prescriptive rights, but if he is allowed this affirmative defense his burden of proof is enormous.

VIII. Access to the Water

Although the act provides for the granting of water rights, and then limits them to a specific place of use and point of diversion, it contains no provision for right-of-way between the source and the place of use. Under the riparian doctrine water could only be used on riparian land—that is, land contiguous to a stream or lake.[200] Under prior appropriation, however, the land need not be so situated.[201] Therefore, one who has no access to the source of water may acquire a valid appropriative right, but unless he can purchase an easement or right-of-way, he will not be able to exercise the right. One exception exists in the case of hydroelectric companies which are granted statutory powers of eminent domain for the taking of land to establish reservoirs.[202]

If the maximum benefits of the act are to obtain, it should have a provision allowing the appropriator some assured way of obtaining access to the source of water.

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[198] *E.g.*, Pabst v. Finmand, 190 Cal. 124, 211 Pac. 11 (1922).

[199] *Id.*

[200] *E.g.*, Turner v. James Canal Co., 155 Cal. 82, 99 Pac. 520 (1909).

[201] *E.g.*, Hutchins at 30.

[202] Miss. Code Ann. § 2777 (1956).

IX. Some Concluding Observations

The Mississippi Water Appropriation Act is a little-noted, but extremely forward-looking, piece of legislation. For the first time in American jurisprudence a humid eastern state has prepared for a future water shortage, the occurrence of which is not yet even indicated, by adopting prior appropriation as its water law. This is a giant step, but only time will tell if it is in the right direction. Many eastern states have enacted legislation that modifies or clarifies water rights,[203] yet none have gone as far as Mississippi. It is too early to ascertain if the one state has gone too far, or the others not far enough. A few observations can be noted, however.

An ideal system of water allocation serves the total community—not merely riparians, appropriators, or sportsmen. In order to do this it must have at least four essential features: mobility, versatility, flexibility, and security.

There are two aspects to mobility. First, the user must be able to transport the water a reasonable distance from the source to the place of use, and he must be provided with the legal means of acquiring access for such transportation. Secondly, the right iself must be mobile. That is, it must be transferable from person to person, and from place to place.

Versatility means that the system must be geared to serve farmer and fisherman, manufacturer and municipality, and the myriad other interests demanding a fair share of the water. This does not mean that any attempt should be made to satisfy their wants equally. On the contrary a versatile system is one that can apportion water in such a manner as to effect the greatest economic and other social gain for the community.

The flexible system is one that accommodates changing patterns of water use and appropriation as circumstances may demand. In fact, to be truly effective such a system should provide the machinery for encouraging or even compelling (as through condemnation) beneficial changes in such patterns.

In a sense running counter to versatility and flexibility is security in water rights. This is what the economist would consider security of investment, for without it the necessary expenditure for water utilization projects of any magnitude will not be made. In the absence of a reasonably secure water right it is doubtful if hydro-electric plants, irrigation districts, or water management districts would be developed.

The Mississippi act contains some, but not all, of the foregoing features. It has mobility, subject, to an extent, to Board approval, but it provides no method of acquiring necessary access ways for transportation. The act is versatile in that practically any conceivable beneficial

[203] For an excellent summary of eastern legislation see Ellis, *Water Law in the Eastern United States*, 18 J. of Soil & Water Conservation 19-27 (1963).

use may be accommodated. However, it is a versatility predicated upon benefits to the user than to the total community. The statute is flexible in that holdings can be transferred, thus breaking up prior patterns, but there is no way to compel such changes. Finally, the act provides security with a perpetual right that cannot be taken away from the appropriator except in rare instances.

From the preceding it is clear that the Mississippi act contains all four necessary features, but that in three of them some essential element is lacking. Thus, the act has weaknesses. However, even in those states where prior appropriation has been the law for one hundred years, many of these elements are lacking, and no system above criticism exists. The Mississippi act is a significant step, and rather than being too quick to criticize its provisions or to belittle its importance, we should applaud the effort and give it a chance to prove itself in the heat of competition for water.

RESERVATION AND EXCEPTION OF MINERALS IN MISSISSIPPI CONVEYANCING

*Jack H. Ewing**

Introduction

At common law the owner of land in fee simple owned not only the face of the earth, but everything under it. He alone could prospect for, sever and remove from the land anything on or beneath its surface.[1]

Mississippi follows this common-law doctrine. The term "land" includes the surface and the minerals. A conveyance of the land, without more, passes the title to both.[2]

However, land may be divided horizontally so that separate estates or interests exist, as where the surface belongs to one person and the minerals to another.[3] Such division occurs when the owner of the land conveys the minerals and keeps the surface, or when he conveys the surface and keeps the minerals. When the minerals are owned separate from the surface, they are said to have been severed. In such cases the surface owner no longer has the right to prospect for, sever and remove the minerals, for this right now belongs exclusively to the mineral owner as an incident of his ownership.

When the owner of the land desires to convey the surface only, he excludes the minerals from the operation of the deed by reserving or excepting them. The purview of this discourse is the reservation and exception of minerals in the conveyance of Mississippi lands.

Distinction Between Reservation and Exception

There is a material difference under the common law between a reservation and an exception in a deed.[4] Where the terms are used in their strict or accurate sense, the distinction is important.[5]

An exception, according to Lord Coke, saves back part of that being granted, and the thing excepted must be in esse. On the other hand, a reservation creates a new right which consists of a thing not in esse. Stated differently, a reservation is a regrant from the grantee to the grantor.[6] An exception removes from the grant some portion of the estate

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[1] H. Williams and C. Meyers, Oil and Gas Law § 202 (1964) [hereinafter cited as Williams and Meyers].

[2] *See, e.g.*, Gulf Refining Co. v. Terry, 163 Miss. 869, 142 So. 457 (1932).

[3] *See, e.g.*, Stern v. Parker, 200 Miss. 27, 25 So. 2d 787 (1946), *suggestion of error overruled*, 200 Miss. 27, 27 So. 2d 402 (1946).

[4] 26 C.J.S. *Deeds* § 137 (1956).

[5] 23 Am. Jur. 2d *Deeds* § 262 (1965).

[6] 1 Williams and Meyers § 310.

granted which would otherwise pass under the general description in the deed, while a reservation creates a new right in the grantor.[7] The primary difference in the two terms is that a reservation is always in favor of or for the benefit of the grantor, while an exception is simply an exclusion from the grant of some interest which can either be vested in the grantor or outstanding in a third party.[8]

At common law the term "reservation" was confined to the creation of rent or service of a feudal nature.[9] Easements and profits were excluded from its application.[10] In time, however, easements and profits were subjects of reservation, and it is now said that reservations and exceptions may be of an undivided interest, a present estate, a profit or easement, or other corporeal or incorporeal heraditaments.[11]

When the owner of land conveyed it with an exception of a part—the east ten acres, for example—the excepted ten acres, having been excluded from the operation of the deed, unaffected thereby, and carved out of the whole body of the land, continued to be owned by the grantor by virtue of his original title and as a part of what he originally acquired. Let us assume, however, that he wanted to convey the whole body of the land and retain only the right to receive from the grantee some rent or service issuing out of it. This rent or service he would retain by reservation. An exception in a deed was properly placed in the granting clause, while a reservation belonged in the reddendum clause.[12]

Moreover, under the common law rule that words of inheritance were necessary to vest a grantee with fee title, and under the fiction that the things reserved was regranted by the grantee to the grantor, the grantor had to reserve for himself and his heirs, or he reserved only a life estate. However, such words of limitation were not required for an exception since the grantor was simply keeping what he excepted, and the deed had nothing to do with it.[13]

Furthermore, the theory of the ancient law was that a grantee in a deed poll was not bound by the covenants and stipulations therein purporting to bind him since he had not signed the deed; consequently, where a grantor was to reserve something, it was necessary that the deed of indenture, signed by both parties, be used. The deed poll was always sufficient to support an exception since the excepted property was not within the operation of the deed.[14]

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[7] Thornhill v. Ford, 213 Miss. 49, 56 So. 2d 23 (1952).

[8] 6 G. THOMPSON ON REAL PROPERTY § 3090, at 777 (1962).

[9] 5 RESTATEMENT OF PROPERTY § 473, at 2970 (1944); 6 G. THOMPSON ON REAL PROPERTY § 3090 (1962).

[10] *Id.*

[11] 6 G. THOMPSON ON REAL PROPERTY § 3090 (1962).

[12] *Id.* at 777.

[13] *Id.* at 779.

[14] 5A G. THOMPSON ON REAL PROPERTY § 2704, at 1077-78 (1957).

The rigid distinction between a reservation and an exception proved unsatisfactory in practice. An unskilled grantor tended to overlook the necessity of expressly reserving a thing to himself and his heirs in order that he might enjoy it in fee. To him, the retention of the thing reserved appeared to result from his own act rather than that of his grantee. He looked upon it as something retained out of his previously existing interest rather than something conveyed to him by his grantee. There were other mysteries of the art of reservation and exception that confounded him. The result was that the courts became prone to relieve such persons from the effects of their ignorance.

The ancient rules pertaining to reservations and exceptions came to be regarded by many as hoary, outmoded, and obsolete. Doubtless there were those who cried out, like Mr. Bumble, that "if the law supposes that, the law is a ass, a idiot." One of this writer's favorite philosophical gems, the author of which is to him unknown, is the following pragmatic jewel:

> So what, so what?
> A pedigree is worthless if the horse won't trot.

Parenthetically, I think it a fair inference that the people of every age have preferred a realistic treatment and administration of judicial matters.

The courts, weary of splitting hairs, began to strive for a practical approach. The following declaration of the Arkansas Supreme Court, referring to the historic rule that an exception had to appear in the granting clause and a reservation in the reddendum clause, is a typical reaction: "there is no reason the contract thus consummated should be judicially disregarded in order that a technical rule may be reverentially embraced as it totters under the weight of antiquity."[15]

In a recent case decided by the Fifth Circuit U. S. Court of Appeals which involved Louisiana minerals, the court stated:

> The distinction between a "reservation" and an "exception" is an obsolescent, formalistic nicety of common law conveyancing that may hinder as often as it may help a logical and realistic approach to the interpretation of instruments.[16]

While the distinction between an exception and a reservation still exists, it is happily more academic than significant. In modern law the words "except" and "reserve" are generally treated as synonymous and are used interchangeably.[17] Today the courts are concerned with what the parties intended from the four corners of the instrument, rather than

[15] Stewart v. Warren, 202 Ark. 873, 153 S.W.2d 545 at 546 (1941).
[16] Elkins v. Townsend, 296 F.2d 172, 177 (5th Cir. 1961).
[17] Federal Land Bank v. Cooper, 190 Miss. 490, 200 So. 729 (1941).

with ancient forms and terminology. Taking the instrument as a whole, was it intended that the grantor retain some part of or interest in the property, and if so, what is the nature and extent of that which he retained?[18] Fortunately, the courts are now more interested in substance than semantics, and in fact rather than formality.

At least three additional things now appear to be well settled in respect to the creation of reservations and exceptions in deeds: (1) The reservation or exception may be made in any part of the deed.[19] (2) Words of inheritance are not necessary for a reservation (they never were necessary for an exception).[20] (3) The deed need be executed only by the grantor. When the grantee accepts it, it becomes the mutual act of the parties and both are bound by its covenants and stipulations.[21]

In summary, the modern distinction between a reservation and an exception is generally "a distinction without a difference," or "an artificial abstraction."

The Chinese have an old saying that sometimes there are too many ticks on the lion's belly. Many laymen sincerely believe that the body of law is infested with countless technicalities and refinements that tend to sap it of practicality and effectiveness. In the area of reservations and exceptions it is pleasing to note that the courts—and particularly the Mississippi courts—have gone far to strip the ancient common law ship of needless and harmful barnacles.

Creation and Validity

A valid reservation or exception presupposes a valid deed. However, the purpose here is to discuss the validity of reservations and exceptions, not the validity of deeds.

The following may be said to be the requirements of a valid reservation or exception: (1) It must be created by apt words.[22] (2) It must arise out of the estate granted.[23] (3) It cannot create any interest in favor of a stranger to the title.[24] (4) It must describe the thing reserved or excepted with certainty.[26]

A. Apt Words

While no specific form is required, the intent to create a reservation or an exception must be clearly disclosed by apt words, and the language

[18] Rogers v. Morgan, 250 Miss. 9, 164 So. 2d 480 (1964).
[19] 6 G. Thompson on Real Property § 3090, at 779 (1962).
[20] Miss. Code Ann. § 833 (1956).
[21] 5A G. Thompson on Real Property § 2704, at 1077-78 (1957).
[22] 26 C.J.S. *Deeds* § 138 (1956).
[23] *Id.* at § 139.
[24] 1 Williams and Meyers § 310.4.
[25] 23 Am. Jur. 2d *Deeds* §§ 264, 266 (1965).

creating the reservation or exception must be as certain and definite as that found in the granting clause.[26]

In *Gulf Refining Co. v. Stanford*[27] and in *Hassie Hunt Trust v. Proctor,*[28] deeds conveying land contained a provision that if minerals were discovered the grantor and grantee should "share" the profits equally. The word "share" was treated as a reservation in favor of the grantor. In *Wilson v. Gerard,*[29] where a deed recited that the land was conveyed "subject to" a certain mineral interest, the words "subject to" were considered the equivalent of "reserving." In *Holifield v. Perkins*[30] the addition after the granting clause of the words, "[t]his sale does not include any part of the delay rentals on the present oil lease."[31] were held to reserve such rentals to the grantor.

A recital that the grantor "shall have and own"[32] the minerals, that the grantor "saves"[33] or "retains"[34] the minerals, or the use of equivalent terminology, would appear to be operative to effect a reservation or exception.

B. Out of Estate Granted

A reservation or exception must be out of the estate which is granted and must refer to something being conveyed.[34] The thing granted is the thing which the reservation or exception operates on or refers to.[35] It is elementary that where Tract A alone is the subject-matter of a deed—the thing granted—the grantor cannot reserve or except a part of or an interest in Tract B. In *Federal Land Bank v. Cooper*[36] there was a conveyance of a tract of land. Following the description was a new sentence reading "One-half interest in all minerals is reserved to the Grantor."[37] The grantee insisted that the exception was void because it did not state whether it referred to the property conveyed or to some other property. The court said that the exception must be construed in connection with its context, and when this was done it clearly appeared that the exception was limited and referred to the minerals in the land conveyed.

The reservation of exception must affect part of the thing only and not all.[38] The reservation or exception is repugnant to the grant and thus

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[26] 26 C.J.S. *Deeds* § 138, at 999 (1956).

[27] 202 Miss. 602, 30 So. 2d 516 (1947).

[28] 215 Miss. 84, 60 So. 2d 551 (1952).

[29] 213 Miss. 177, 56 So. 2d 471 (1952).

[30] 233 Miss. 876, 103 So. 2d 433 (1958).

[31] *Id.* at 879, 103 So. 2d at 434.

[32] Moss v. Jourdan, 129 Miss. 598, 611, 92 So. 689, 690 (1922).

[33] Houston Oil Co. v. Williams, 57 S.W.2d 380, 383 (Tex. Civ. App. 1933).

[34] Stephan v. Kentucky Valley Distilling Co., 275 Ky. 705, 122 S.W.2d 493, 497 (1938).

[35] 26 C.J.S. *Deeds* § 139 (1965).

[36] 190 Miss. 490, 200 So. 729 (1941).

[37] *Id.* at 500, 200 So. at 730.

[38] Moore v. Lord, 50 Miss. 229 (1874).

void where the reservation or exception is of all the property granted or is as broad as the grant.[39] In *Moss v. Jourdan*[40] it was contended that where there was a conveyance of land, with an exception of all minerals, the exception was void because the entire mineral estate was granted and then excepted. Therefore, the exception was as large as the grant. The Mississippi Supreme Court said that such contention was without merit because the land conveyed did not consist solely of minerals.

The rule that the reservation or exception must not consist of the entire estate, but must be out of the estate granted, has been applied where the reservation or exception was of the effect of the thing granted.[41] In *Dukes* v. *Crumpton*,[42] where the grantor had conveyed land but reserved all rights of sale and management, the Mississippi court held that such reservation was repugnant to the granting clause. This writer has little doubt that if a grantor conveys a mineral interest, but reserves unto himself all rights and incidents, the reservation would be declared a nullity. Where only partial rights or incidents were reserved, however, the reservation has been upheld. In *Anderson v. Butler*[43] it was said that the parties to a mineral deed may make such contracts as they wish regarding the division of rentals and royalties. In *Dale v. Case*[44] the court held that in a conveyance of minerals it was not violative of the repugnancy rule to reserve in the grantor the benefits under an existing lease. In *Westbrook v. Ball*[45] the court said that the owner of minerals has the right to execute oil, gas, and mineral leases, to select the lessee, to fix the terms of the lease, to receive therefrom the bonuses, delay rentals and royalties, and to transfer all or a part of his rights. However, in reserving minerals all rights are retained that are not specifically granted. In *Holifield v. Perkins*[46] a reservation of rentals payable upon the existing lease or any future lease was held to be valid.

C. In Whose Favor

The feudal rule was that livery of seisin was necessary to create a freehold estate.[47] This concept led to the modern rule that a reservation or exception could not create an interest in favor of a stranger to the title.[48]

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[39] 23 AM. JUR. 2d *Deeds* § 267, at 302 (1965).
[40] 129 Miss. 598, 92 So. 689 (1922).
[41] Moore v. Lord, 50 Miss. 229 (1874).
[42] 233 Miss. 611, 103 So. 2d 385 (1958).
[43] 203 Miss. 512, 35 So. 2d 709 (1948).
[44] 217 Miss. 298, 64 So. 2d 344 (1953).
[45] 222 Miss. 788, 77 So. 2d 274 (1955).
[46] 233 Miss. 876, 103 So. 2d 433 (1958).
[47] 1 WILLIAMS AND MEYERS § 310.4.
[48] *Id.* at 566; *see, e.g.*, Wilson v. Gerard, 213 Miss. 177, 56 So. 2d 471 (1952).

This rule was applied by the Mississippi Supreme Court in *Cook v. Farley*.[49] Goss had acquired title from the Cooks by deed containing an exception which read as follows: "There is also excepted from this conveyance all oil, gas and mineral deposits on said lands, which the grantors hereto have promised to convey to Aquilla B. Cook, ..." Aquilla B. Cook was the son of the grantors. The court said:

> [T]he son of the grantors in the deed was not a party thereto, it was not delivered to him, and it contains no words of a present grant or conveyance. The language employed in the exception is merely explanatory of the grantors' present purpose or reason for not then conveying the minerals to their grantee Goss. Under what terms and conditions, and for what consideration, if any, they may have promised to convey the minerals to their son at some future date, or whether or not the same were complied with by him, is not disclosed. But it is sufficient to say that the conveyance to Goss for the land contained no words importing a grant of the minerals to the son of the grantors therein.[50]

While no estate passed to the third party mentioned in the deed, the exception was not wholly inoperative since it retained title in the grantors to the property embraced in the exception.

The rule that a reservation or exception cannot be made for the benefit of a stranger does not apply where the third party is not merely a party to the deed. When he has an outstanding interest, an exception may properly and validly be made recognizing and confirming such third person's rights.[51]

The rule is sometimes stated in terms of strangers to the deed, rather than strangers to the title, which suggests that a reservation is good if the person for whom it is made joins in the instrument.[52] This is not found to be the rule in Mississippi.

Another interesting question arises where a grantee accepts a deed containing a reservation from a grantor who has no title. Later, such grantee acquires title from the true owner. Is he estopped to deny the reservation in the first deed? Apparently not, at least in Mississippi.[53]

D. Certainty

A reservation or exception must be described with certainty.[54] In case of uncertainty or insufficiency in the description it is the reservation

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[49] 195 Miss. 638, 15 So. 2d 352 (1943).

[50] *Id.* 649, 15 So. 2d at 355.

[51] 26 C.J.S. *Deeds* § 138, at 1003 (1956).

[52] 1 WILLIAMS AND MEYERS § 310.4, at 567.

[53] State v. Butler, 197 Miss. 218, 21 So. 2d 650 (1945).

[54] 26 C.J.S. *Deeds* § 140.7(c), at 1018 (1956).

or exception, and not the grant, that is vitiated, and the grantee has the benefit of the defect.[55]

This rule is well illustrated by *Nunnery v. Ford*,[56] although the case did not involve minerals. There was a conveyance of eighty acres of land, "except two acres, more or less, lying on the north side of Little Creek." It turned out that there were eleven acres north of the creek. The exception was declared void for uncertainty, and the grantee took the entire eighty acres. Incidentally, the court pointed out that if the exception had been for all the land north of the creek, being or containing two acres, more or less, the rule would have been different, but as it was, no one could find what was excepted. In a similar case, where the description read "N 1/2, less six acres, of Section 14" of a certain township and range, the court held that since the six acres intended for exception was ambiguously described, the deed conveyed the entire N 1/2. The conveyance being the act of the grantor, the grantee should have the benefit of the descriptive uncertainty.[57]

The argument was made in *McNeese v. Renner*[58] that an exception of minerals, oil, and gas "that might hereafter be discovered" was void because of the quoted language. The court said, however, that the words "that might hereafter be discovered" neither added to nor detracted from what the exception would have meant had such words been omitted and upheld the exception simply as one of minerals, oil, and gas.

In *Wilson v. Gerard*[59] the grantor conveyed land "subject to one-half interest in mineral and oil rights as conveyed to Wm. Henderson." The court assumed that Wm. Henderson was a fictitious person and that the quoted language was an invention of the grantor apparently to deceive the grantee. Nevertheless, the court held that the quoted language constituted a valid exception. It said that an exception will be good as to property recited to have been previously sold or conveyed, although such recital is false.

In *Oldham v. Fortner*[60] the conveyance was of certain property "[E]xcept all mineral and mineral rights, heretofore sold and conveyed . . . ." The court held that the grantee acquired no title to the minerals regardless of whether a mineral deed previously executed by the grantor was valid.

A case that created considerable interest when it was decided is *The Texas Company v. Newton Naval Stores Co.*[61] An oil and gas lease

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[55] 26 C.J.S. *Deeds* § 140(7)(c) (1956).
[56] 92 Miss. 263, 45 So. 722 (1908).
[57] McAlister v. Honea, 71 Miss. 256, 14 So. 264 (1894).
[58] 197 Miss. 203, 21 So. 2d 7 (1945).
[59] 213 Miss. 177, 56 So. 2d 471 (1952).
[60] 221 Miss. 732, 74 So. 2d 824 (1954).
[61] 223 Miss. 468, 78 So. 2d 751 (1955).

was granted upon certain lots "except G & S I R R right-of-way through said lots." Some eleven years earlier the railroad company had obtained authority to abandon its line and had taken up its tracks. There no longer remained any right on its part to cross over the lots. The sole question was whether the phrase above quoted excluded the strip of approximately fifteen acres that was formerly occupied by the right of way. The lessor argued that the strip was excluded since the term "right of way" referred to the strip in fee, as there was no other reason for referring to it in the description; the right of way having become, by abandonment, a "deed" easement. The mineral lessee included in its argument the contention that since the easement was "dead," it was not an easement at all and the reference to it was vague and meaningless so that the reference should be ignored and the lease treated as covering all of the lots as if the right of way had not been mentioned in the description. The court held, as contended by the lessor, that the lease did not cover the strip.

However, in the case of *Richardson v. Moore*[62] the court said that a reservation of oil and mineral rights "in accordance with a deed . . . conveying to us the said land" did not withhold them to the grantor, although the above deed by which the grantors had acquired title contained no mineral exclusion. This holding, however, is based principally upon the finding by the court that when the second deed was made the grantors did not know whether any, or if any, what mineral exception was in the deed through which they claimed. The prior deed was not at hand, and the circumstances surrounding the execution of the second deed showed that the grantors really did not intend to retain the title to any minerals in themselves but were merely protecting their warranty.

In *Shurley v. Aaron*[63] a deed reserved the minerals to the grantors "[O]nly so long as the said land is owned and remains in the possession" of the grantees. The grantors claimed that the "so long as" provision was vague and uncertain and should be stricken so that the reservation would be enlarged to a perpetual estate. The court rejected this, saying that there was no ambiguity whatever in the reservation, and that it clearly reserved in the grantors a determinable fee which had terminated when the grantees subsequently conveyed the land to another.

Before turning from the subject of certainty, it should be observed that the reserved or excepted interest should be described with the same definiteness that is required for the granting of such interests.[64] In an early Mississippi case[65] the court said that "[T]he rule is well settled that in order to except certain property out of a conveyance, which without

[62] 198 Miss. 741, 22 So. 2d 494 (1945).
[63] 224 Miss. 490, 80 So. 2d 61 (1955).
[64] 23 Am. Jur. 2d *Deeds* § 264, at 300 (1965).
[65] Richardson v. Marqueze, 59 Miss. 80, 94 (1881).

the exception would carry all, the words of exception must be as definite as those required to convey title; and that, if they are not so, the whole property passes." This rule was recently reaffirmed.[66]

CONSTRUCTION

As stated by Mr. Summers in his monumental work on oil and gas law, instruments purporting to create separate estates or interests in oil and gas by grant, exception, or reservation often require interpretation by the courts to determine whether such estates or interests have been created, and if so, the extent and quality thereof.[67] The usual rules of construction of instruments and admissibility of evidence are applicable in such situations.[68]

In *Oldham v. Fortner*[69] the Mississippi Supreme Court held that the general rules relating to the construction and operation of deeds, and of reservations and exceptions therein, ordinarily control where minerals are involved, and "[T]his includes the rules to be applied in determining whether or not under the terms of particular instruments, the minerals or mining rights have been conveyed or whether they have been reserved or excepted."[70]

However, in *Berry v. Luckett*[71] the court ruled that there is little, if any, need for judicial interpretation where effect can be given to all provisions of the deed and the intention of the parties is plain. The court stated:

> We are of the opinion that there are in the deed of Berry to Cook no repugnant clauses nor inconsistent provisions. All provisions may be harmonized; none need be rejected; and effect may be given to all. In such a situation, where the intention is plain, rules of construction cannot be invoked.[72]

Not all cases involving reservations and exceptions, and particularly those concerning minerals, are as easy to decide. Many, if not most, present vexatious and perplexing questions which necessitate an understanding and application of pertinent construction principles. We would do well, therefore, to take at least a cursory look at such principles.

A. Rules of Construction

1. "The main object in construing a deed is to ascertain the intention of the parties from the language used and to effectuate such intention

[66] Texas Co. v. Newton Naval Stores Co., 223 Miss. 468, 78 So. 2d 751 (1955).
[67] 1 SUMMERS, OIL AND GAS, § 134, at 326 (1954).
[68] *Id.*
[69] 221 Miss. 732, 74 So. 2d 824 (1954).
[70] *Id.* 742, 74 So. 2d at 828.
[71] 248 Miss. 99, 158 So. 2d 706 (1963).
[72] *Id.* 107, 158 So. 2d at 710.

where not inconsistent with any rule of law."[73] If at all possible, this must be done under recognized rules of construction, even though the deed is inarticulately and untechnically drawn.[74]

2. The construction of a deed should be based upon the entire instrument, and "[E]ach word and clause therein should be reconciled and given a meaning if that can be reasonably done."[75] This is referred to as the "four-corner doctrine." The rule that earlier clauses prevail over repugnant and inconsistent later clauses does not apply where, from the whole instrument, the intention of the parties thereto is plain.[76] Where, however, there is a clear and manifest repugnancy between two clauses, the first will prevail, but such rule cannot be invoked where one plain intention can be deduced from the instrument as a whole.[77] When necessary in order to harmonize all items of a deed, more certain items will, if reasonably possible, draw to themselves less certain items.[78]

3. All negotiations between the grantor and the grantee with respect to the scope of the deed are merged in the deed, and it is error to admit oral testimony where there is no ambiguity therein.[79] It is the duty of the court to construe the instrument as written.[80] Where, however, the deed *refers* to other matters, they must be construed together.[81]

4. Where written provisions cannot be reconciled with printed provisions in the deed, written provisions control.[82] If printed and typewritten provisions are inconsistent, typewritten provisions prevail.[83]

5. A deed must be construed most strongly against the grantor, and most favorably to the grantee.[84]

6. Where words in a deed are ambiguous and the parties by their acts have given a practical construction thereto, such construction may be resorted to.[85]

7. In construing the language of an ambiguous deed the court may ascertain the intention of the parties by placing itself in their position when the deed was executed and by considering the surrounding circum-

[73] 26 C.J.S. *Deeds* § 83, at 814 (1956).
[74] Allen v. Boykin, 199 Miss. 417, 24 So. 2d 748 (1946).
[75] Richardson v. Moore, 198 Miss. 741, 22 So. 2d 494 (1945).
[76] Holifield v. Perkins, 233 Miss. 876, 103 So. 2d 433 (1958).
[77] Martin v. Adams, 216 Miss. 270, 62 So. 2d 328 (1953).
[78] Dunn v. Stratton, 160 Miss. 1, 133 So. 140 (1931).
[79] Dale v. Case, 217 Miss. 298, 64 So. 2d 344 (1953).
[80] Holifield v. Perkins, 233 Miss. 876, 103 So. 2d 433 (1958).
[81] Richardson v. Moore, 198 Miss. 741, 22 So. 2d 494 (1945).
[82] Dale v. Case, 217 Miss. 298, 64 So. 2d 344 (1953).
[83] Bartlett & Co., Grain v. Merchants Co., 323 F.2d 501 (5th Cir. 1963).
[84] Fatherree v. McCormick, 199 Miss. 248, 24 So. 2d 724 (1946).
[85] Yazoo & M.V.R. Co. v. Lakeview Traction Co., 100 Miss. 281, 56 So. 393 (1911).

stances.[86] In such a case extrinsic evidence is admissible.[87] However, when there is no ambiguity in the deed, it is error to admit oral testimony.[88]

B. Areas of Construction

Most of the cases involving mineral reservations and exceptions fall within a relatively few areas.

1. *What are minerals?* It is generally recognized that the word "minerals" has no definite and certain meaning which covers all cases.[89] However, it normally includes oil and gas unless other language in the instrument restricts the definition as used by the parties to exclude these natural resources.[90]

The Supreme Court of Mississippi has observed in *Witherspoon v. Campbell*[91] that it is a matter of common knowledge in Mississippi that most grantors and purchasers of minerals in place ordinarily are referring to oil, gas, and other minerals of like kind and character. *Federal Land Bank v. Cooper*,[92] wherein a deed simply recited that "[O]ne-half interest in all minerals is reserved to the grantor,"[93] is representative of the common practice of using only the term "minerals" when referring principally to oil and gas.

It is too well settled to doubt that in Mississippi the word "minerals," as commonly used, includes oil and gas. It has become a rule of property here. Moreover, where the term "mineral rights" is used, it is generally treated as meaning "minerals" or "minerals in place."[94]

This paper is concerned with minerals only insofar as the term embraces oil and gas. It is noted in passing, however, that the Mississippi Supreme Court in *Moss v. Jourdan*,[95] a 1922 decision, held gravel to be a mineral, but in *Witherspoon v. Campbell*,[96] decided in 1954, the court reversed itself. In the latter case the court held that *Moss* was decided when it was unknown whether any oil, gas, or other like minerals were present in this state, and when sand and gravel were much in demand for highway construction. The parties doubtless had sand and gravel in mind when they used the word "minerals"; but since the former decision oil and gas had been discovered in this state, and, at least in the counties

[86] 26 C.J.S. *Deeds* § 92, at 850 (1956); *see*, Witherspoon v. Campbell, 219 Miss. 640, 69 So. 2d 384 (1954).

[87] *Id.*

[88] Lucas v. Thompson, 240 Miss. 767, 128 So. 2d 874 (1961).

[89] 1 WILLIAMS AND MEYERS § 219.

[90] 1 WILLIAMS AND MEYERS § 219.1.

[91] 219 Miss. 240, 69 So. 2d 384 (1954).

[92] 190 Miss. 490, 200 So. 729 (1941).

[93] *Id.* at 500, 200 So. at 730.

[94] 1 WILLIAMS AND MEYERS at 219.1.

[95] 129 Miss. 598, 92 So. 689 (1922).

[96] 219 Miss. 640, 69 So. 2d 384 (1954).

where they were being produced, "minerals" had come to apply primarily to oil and gas. In other cases the court has held bentonite to be included in a reservation of minerals where bentonite had been mined in the county prior to the execution of the deed.[97]

2. *Mineral or Royalty?* Was a reservation or an exception created by the grant? This question has frequently been before the court as a major subject of litigation.

Perhaps here we should distinguish between mineral ownership and royalty ownership. The mineral owner has the right of entering, occupying, and making such use of the surface as is reasonably necessary in exploring, mining, removing, and marketing the minerals. Where the mineral estate is severed from the surface, it is not necessary that this right be expressly granted or retained. It is implied in the grant, reservation, or exception, and it is incidental to ownership.[98] As a matter of common knowledge, this right is not ordinarily exercised by the mineral owner himself since it is not often that he is in the mining business or economically able to exercise such right. Usually, the mineral owner transfers this right to another who is in the business, called a lessee, under the terms of a written agreement called an oil, gas, and mineral lease. When this is done, the mineral owner becomes what is known as a lessor.

The lease is executed for a fixed period of time, called the primary term, which is usually five or ten years. In one Mississippi case, however, it was held that the term of the lease could be perpetually renewed.[99] The lessor is ordinarily paid a cash consideration for the lease, which is called a bonus. To defer commencement of drilling operations from year to year during the primary term, the lessee must pay to the lessor, on or before the anniversary date of the lease, an annual sum of money called a delay rental, which renews the lease for the ensuing year. The lessee may or may not elect to drill. If he does, he must commence his operations within the primary term, for in the absence of drilling or production the lease automatically expires with the primary term. If the lessee drillls and obtains production, he must pay or deliver to the lessor an agreed upon share of production, called a royalty. In *Palmer v. Crews*[100] the court defined a royalty as "[A]n interest in real estate, entitling the royalty owner to a share in the production of oil, gas, or other minerals therefrom." In *Lloyd's Estate v. Mullen Tractor & Equipment Co.*[101] the court held that the lessee had an interest in the nature of a "determinable

[97] *E.g.*, Cole v. McDonald, 236 Miss. 168, 109 So. 2d 628 (1959).

[98] *E.g.*, Westbrook v. Ball, 222 Miss. 788, 77 So. 2d 274 (1955).

[99] Lloyd's Estate v. Mullen Tractor & Equip. Co., 192 Miss. 62, 4 So. 2d 282 (1941).

[100] 203 Miss. 806, 35 So. 2d 430 (1948).

[101] 192 Miss. 62, 4 So. 2d 282 (1941).

fee," subject to be defeated only by failure to remove oil and gas within the original period or otherwise to pay annual rental in advance. In *Palmer v. Crews*[102] it was said that the lessor retained a reversionary interest or an estate known as a possibility of reverter.

The royalty that the lessor is entitled to receive under the lease may be the subject of transfer by a royalty deed. The usual royalty deed not only grants royalty under the existing lease, but also royalty under any future lease. In many instances there is no existing lease so that the deed, in effect, effectuates only a transfer of royalty under a lease to be executed in the future, or if the mineral owner should elect to develop rather than lease, a transfer of a share of production, likewise called a royalty, equivalent to royalty payable under lease. Conventionally, the royalty is one-eighth of the whole of production, but it is not unusual for it to be three-sixteenths or one-fourth. The amount is contractual, being whatever amount the parties agree upon. It is either in money or in kind, as also agreed upon, and is payable free of any development or production costs.

A mineral owner may reserve or except royalty interests, as well as grant them. Grants, reservations, and exceptions of future royalty are perfectly legal, as are grants, reservations, and exceptions of perpetual royalty or royalty for such a term as may be agreed upon. An outright grant of mineral will pass the royalty as well as all rights, present and future, incidental to the mineral ownership.[103] As was said in *Westbrook v. Ball,*[104] it is all a matter of contract, and the mineral owner can transfer or reserve all or only part of his rights.

The distinction between mineral and royalty is illustrated in *Bailey v. Federal Land Bank of New Orleans.*[105] The state tax collector had sought to back-assess and collect ad valorem taxes upon an undivided one-half mineral interest which the bank had retained when it sold a tract of land. The bank's position was that, at most, the mineral interest was assessable with only a one-sixteenth royalty interest; that is, one-half of one-eighth, since the bank had leased its one-half interest under a lease providing for payment of a one-eighth royalty on the basis of full mineral ownership. In upholding the collector's assessment of one-half minerals the court said:

> On the first issue presented, we think it well settled that the estate owned by an owner of minerals in place is substantially different from the estate of an owner of a 1/8th royalty or a part thereof, whether such ownership of the royalty interest is acquired by purchase or by a reservation or exception. The

[102] 203 Miss. 806, 35 So. 2d 430 (1948).
[103] Koenig v. Calcote, 199 Miss. 435, 25 So. 2d 763 (1946).
[104] 222 Miss. 788, 77 So. 2d 274 (1955).
[105] 207 Miss. 764, 43 So. 2d 375 (1949).

owner of all or an undivided interest in minerals in place which are under an oil and gas lease in the standard form is not only entitled to receive royalty in the event of production, but also annual rentals under the lease. He also owns the possibility of a reverter of the minerals in fee upon the expiration of the lease according to its terms or because of the failure to pay the annual rentals contracted for under the lease. *Armstrong v. Bell*, 199 Miss. 29, 24 So. 2d 10; *Koenig v. Calcote*, 199 Miss. 435, 25 So. 2d 763.

Moreover, the owner of minerals that are under a lease has the right to sell any part of his minerals in place while such a lease is in force the same as he could do if no lease had ever been executed. In other words, the right of an owner of minerals in place to receive annual rentals and the royalty, or any part thereof, that may accrue under a lease is incidental to his ownership of such minerals. He owns the minerals subject to the lease, and he may be assessed with the same subject to the lease.[106]

A very important Mississippi case on the subject is *Mounger v. Pittman*,[107] decided in 1959. In the opinion, which was written by Judge Robert Gillespie, the court stated:

On October 31, 1937, when the subject lands were not under any oil and gas lease, appellants' predecessors in title executed to appellees' predecessor in title a deed to a parcel of land wherein the grantors made the following reservation:

"We do hereby reserve for ourselves, our heirs and assigns, one-eighth of all the oil and gas which may be produced from said lands to be delivered in tanks and pipelines in the customary manner, and this shall be a covenant running with the land and all sales and other conveyances of said lands shall be subject to this reservation and agreement."

The question is whether the reservation reserved to the grantors a non-participating royalty interest or an interest in the minerals (oil and gas) in place. The chancellor held it was a reservation of the minerals in place.

The distinguishing characteristics of a non-participating royalty interest are: (1) Such share of production is not chargeable with any of the costs of discovery and production; (2) the owner has no right to do any act or thing to discover and produce the oil and gas; (3) the owner has no right to grant leases; and (4) the owner has no right to receive bonuses or delay rentals. Conversely, the distinguishing characteristics of an interest in minerals in place are: (1) Such interest is not free of costs of discovery and production; (2) the owner has the right to do any and all acts necessary to discover and produce oil and gas; (3) the owner has the right to grant leases, and (4) the owner has the right to receive bonuses and delay rentals. *Westbrook v. Ball*, 222 Miss. 788, 77 So. 2d 274; *Palmer v. Crews*. 203 Miss. 806, 35 So. 2d 430, 4 A.L.R. 2d 483.

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[106] *Id.* at 790-91, 43 So. 2d at 377.

[107] 235 Miss. 85, 108 So. 2d 565 (1959).

The reservations here involved must be analyzed with the characteristics of the two kinds of estates in mind.

It must be conceded that the reservation retained in the grantors an interest in real estate pertaining to oil and gas. It does not provide, either expressly or by implication, that grantors' share of production is to be free of cost of discovery and production, an important provision in any instrument creating a non-participating royalty interest. The deed containing the reservation did not specifically grant to the grantee any right to discover and produce the one-eighth of the oil and gas, or to grant leases, or to receive bonuses and delay rentals; therefore, all these rights were retained by the grantors. *McNeese v. Renner,* 197 Miss. 203, 21 So. 2d 7; *Westbrook v. Ball,* supra.

The inescapable conclusion is that the interest reserved by the grantors was an estate in the oil and gas in place. The estate created by the reservation has all the characteristics of an estate in the oil and gas, or minerals, in place. It has none of the characteristics of a non-participating royalty interest.

The effect of the words, "which may be produced from said lands to be delivered in tanks and pipelines in the customary manner," will next be considered. *In McNeese v. Renner,* supra (197 Miss. 203, 21 So. 2d 7), this Court held that the words "that might hereafter be discovered on the lands herein described," contained in a reservation of a mineral interest would neither add to nor detract from what the reservation would have meant had they been omitted. And in *Westbrook v. Ball, supra* (222 Miss. 788, 77 So. 2d 275), the reservation included the words, " * * * and as may be mined and produced from said lands, * * * " and in the same reservation this sentence appeared: "All royalties payable will go to the grantor," Notwithstanding these expressions, which were of themselves and standing alone consistent with the reservation of a non-participating royalty interest, the Court held the reservation retained an interest in the minerals in place. In *Texas Gulf Producing Co. v. Griffith,* 218 Miss. 109, 65 So. 2d 447, 834, 835, the conveyance was held to create a royalty interest notwithstanding it contained the words, "in, under and upon the following described lands," and stated that it was the intention of the grantors to convey "24 mineral acres." In *Ford v. Jones,* 226 Miss. 716, 85 So. 2d 215, 216, the instrument was held to be a deed to minerals in place notwithstanding an intention clause which declared that it conveyed "ten (10) royalty acres under the above described lands." It will thus be observed that particular words, phrases, clauses, or sentences in a reservation or deed do not necessarily control the nature of the estate created. The instrument must be considered as a whole.

It cannot be said that the words, "which may be produced from said lands to be delivered in tanks and pipelines in the customary manner," are sufficient in themselves to compel the inference that grantors would receive one-eighth of the oil and gas free of all costs of discovery and production. The quoted words do not express or even infer any intention on the part of the grantors to grant to the grantee all of the incidental

rights of mineral ownership which characterize an estate in the minerals in place.

We hold, therefore, that the grantors reserved an undivided one-eighth interest in the oil and gas in place and the decree of the chancellor should be and is affirmed.[108]

In *Gulf Refining Co. v. Stanford*,[109] a 1947 case, a grantor conveyed land by deed containing a provision reading that "[I]n the event of any minerals, oil, or gas being found in the bounds of the land we are to share the profits equally." The grantee thereafter executed an oil, gas, and mineral lease which purported to cover all of the oil, gas, and other minerals. It was argued that the above provision constituted a reservation of one-half of the minerals in place and that the grantor, not having leased, was entitled to one-half of the production. Rejecting this argument and holding that the reservation was of one-half of royalty only, the court stated:

> [T]he word "profit" is elastic, ambiguous and properly used in more than one sense. . . . Its meaning in a written instrument is governed by the intention of the parties appearing therein and any accurate definition of it must always include the element of gain. When the deed was executed it was not known whether there was any oil in this land, its presence being thereafter discovered. While remaining in the land oil is of no use to any one and no profit or gain can be derived therefrom other than its sale in place, except insofar as the value of the land would be increased thereby. It is clearly not the intention of this deed that the grantor should share in any increased value of the land and the sale of oil in place is unusual, and, if made, must be for a purely speculative price. The intention of the parties to this deed, therefore, must have been to share equally in the gain from or the use of the oil after it had been brought to the surface. The finding of the oil in land and bringing it to the surface is quite expensive, the incurring of which—ex vi termini—is included in the word "profits." The reservation does not provide how this expense is to be met, but it is common knowledge that the landowner does not, and usually could not, himself provide the money therefor, the usual and almost universal method for finding oil and bringing it to the surface, appropriating all that he produces thereby to himself except an agreed portion thereof reserved by and to be delivered, or its value paid, to the landowner and usually designated as a royalty. This is exactly what occurred here and was therefore within the contemplation of the reservation in the deed. . . . Those claiming through the reservation invoke and rest their case on Lord Coke's oft quoted dictum that a grant in terms of the "profits" of land will pass the land itself. But we have no such simple case here, but one where a grantor reserved from or lifted out of his grant an

[108] *Id.* at 86-89, 108 So. 2d at 566-67.

[109] 202 Miss. 602, 30 So. 2d 516 (1947).

> element of the property granted, thereby creating a new right in himself out of the subject of the grant, which reservation must be construed most strongly against the grantor and in favor of the grantee.[110]

In *Hassie Hunt Trust v. Proctor*[111] an almost identical reservation—"[I]f any oil or other mineral is found on the place we are to share the profits equally"—was likewise held to be merely a reservation of a royalty interest.

In the 1964 case of *Rogers v. Morgan*[112] the grantor had conveyed an undivided one-half of the oil, gas, minerals, and ores existing in, under, or on certain property expressly subject to an existing lease described in the conveyance. The lease stated that the grantor was to receive a royalty of one-eighth of the net proceeds and that the grantor conveyed one-half of any net proceeds that might be due to the grantor under said lease. It was further provided that if the lease should expire or lapse, the grantor reserved the right to make future leases, so long as there should be included for the benefit of the grantee the rights and interests being conveyed. It was further provided that the grantor reserved the right to collect and retain all bonuses and rentals paid for or in connection with the existing lease or any future lease. The court, relying on *Mounger v. Pittman*,[113] and construing the deed as a whole, held that the conveyance was a non-participating royalty consisting of an undivided one-half of one-eighth or one-sixteenth of the gross production under the existing lease and a like interest under future leases.

In *Armstrong v. Bell*[114] the court said that the most important question was whether a grantor in the deed reserved unto himself a one-thirty-second royalty in the gas, oil, or other minerals that might be mined or produced under any future lease executed by the grantee after the expiration of the then outstanding lease, or whether only a one-thirty-second interest in the oil, gas, and other minerals in place was reserved in any future lease executed by the grantee. It conceded that a one-thirty-second royalty interest on a one-fourth of one-eighth royalty was reserved unto the grantor under the outstanding lease at the time of the execution of the deed. In the deed the grantor first reserved a one-thirty-second of all gas, oil, and minerals which might be mined and produced. The deed then recited that the land was under a lease wherein the grantor was to receive one-fourth of the one-eighth royalty. The deed also provided that upon expiration of the existing lease the grantee had full powers and authority to execute other leases, under which the

[110] *Id.* at 617-18, 30 So. 2d at 517.
[111] 215 Miss. 84, 60 So. 2d 551 (1952).
[112] 250 Miss. 9, 164 So. 2d 480 (1964).
[113] 235 Miss. 85, 108 So. 2d 565 (1959).
[114] 199 Miss. 29, 24 So. 2d 10 (1945).

grantor was to receive the one-thirty-second share of the gas, oil, or minerals found, mined, or produced. It then recited that the grantor's intention was to reserve a one-thirty-second share in fee simple of the gas, oil, or minerals which might be produced or mined, with the grantee having full power to lease on such terms as he wished; the sole condition being that the grantor was to receive one-thirty-second royalty from the gas, oil, or minerals mined or produced under such lease. The court, in an opinion written by the late Judge Harvey McGehee, held that the grantor reserved a perpetual, non-participating one-thirty-second royalty whether gas, oils, or other minerals were produced under the outstanding lease, under a subsequent lease, or by the grantee or his assigns. It said that the court would look to the entire instrument in determining its meaning, notwithstanding the rule that a deed is to be construed most strongly against the grantor; and if the clear meaning of the conveyance as a whole could be ascertained, the grantor would not lose the mineral royalty interest which he intended to reserve merely because he might have executed and delivered a conveyance that was conceivably ambiguous in some other provisions when considered apart from the entire language employed. Incidentally, the court, quoting Mr. Summers,[115] expressly recognized that a royalty interest may be created prior to any lease for oil and gas purposes.

In *Texas Gulf Producing Co. v. Griffith*[116] there was an outright conveyance of an undivided one-half interest in the oil, gas, and other minerals in, under, and upon the described land, with a recital that the deed conveyed twenty-four mineral acres. The grantor then reserved the exclusive right to lease and to receive the bonuses and delay rentals under future leases and provided that the grantee would not be required to join in the execution of leases. The grantor agreed not to lease for less than one-eighth royalty, and that the grantee would receive one-half of all funds credited to the royalty interest reserved under the existing or any future lease. The court, construing the instrument as a whole without separating it into its formal parts, and gathering the intention from a fair consideration of the entire deed and the language employed therein, held it to be a royalty conveyance. This deed presented a clear case of repugnancy under ancient principles of construction. There was a definite initial conveyance of minerals in place, followed by a definite provision that the interest conveyed was of royalty only. Except for this "four corner" rule, the court would have been constrained to treat the latter provision as repugnant to the grant, thus making the conveyance one of minerals and not royalty.

In *Westbrook v. Ball*[117] the grantor of land clearly reserved the

[115] 3 W. SUMMERS, OIL AND GAS § 572, at 349 (1954).
[116] 218 Miss. 109, 65 So. 2d 447 (1953).
[117] 222 Miss. 788, 77 So. 2d 274 (1955).

entire mineral estate. The basis of controversy was a concluding provision in the deed that the grantee was to receive the cash bonuses and rentals payable under any lease, but all royalties would go to the grantor. The court held that this provision did not change the nature of the reservation from minerals to royalty, but simply constituted a transfer by the grantor to the grantee of certain benefits that otherwise would have remained the property of the grantor as lessor.

In *Ford v. Jones*[118] a grantor used a form R-101 mineral deed to convey an undivided one-fourth mineral interest. After the description there was inserted a recital that the instrument conveyed ten royalty acres. This recital did not convert the conveyance to one of royalty only. The court found no inconsistency because of the recital, for a deed conveying minerals in place carries with it royalty rights unless expressly excepted. The royalty was simply one of the incidents conveyed as a part of the minerals.

3. *Quantum of Interest.* The question of quantum of the interest granted, reserved, or excepted is sometimes before the court.

While it involved a will rather than a deed, an interesting Mississippi case is *Ferguson v. Morgan.*[119] A testator devised to named beneficiaries "[A]ll of my right, title and interest in and to the lands of the T. M. Whetstone Estate of which I may die seized and possessed, except an undivided 1/5 mineral rights and interest in and under said land, which I devise to my son, William Meade Morgan." The testator owned a one-half interest in such lands. Did he except from the devise to the other beneficiaries, and devise to his son, one-fifth of his one-half mineral interest in the land or did the exception, and subsequent devise to the son, apply to a full one-fifth mineral interest in the land? The court said that the exception applied to "said land" so that the son received a one-fifth, and not merely a one-tenth mineral interest.

The case of *Anderson v. Butler*[120] involved a mineral deed by which the grantor conveyed a one-sixteenth interest in the oil, gas, and other minerals, and also a one-half interest in the grantor's right, title, and estate under an existing lease or any future lease. It was the grantee's contention that the latter recital enlarged the interest from a one-sixteenth to a one-half mineral interest. This the court rejected, stating that "[T]itle to minerals in place is a fixed, permanent, and vested estate, whereas sharing of rents and royalties under a mineral lease is a temporary arrangement effective only during the operative existence of the lease."[121] The grantor in this mineral deed later the same day executed a warranty deed conveying fee simple title, but reserving an

[118] 226 Miss. 716, 85 So. 2d 215 (1956).
[119] 220 Miss. 266, 70 So. 2d 866 (1954).
[120] 203 Miss. 512, 35 So. 2d 709 (1948).
[121] *Id.* at 519, 35 So. 2d at 711.

undivided one-sixteenth of the mineral rights theretofore conveyed to his mineral grantee. The mineral grantee was the attorney who had prepared and taken the acknowledgments to both deeds. The court said that by the subsequent deed the parties to the mineral deed had given the mineral deed a practical construction as vesting in the grantee a one-sixteenth interest in the minerals in place.

In the case of *Payne v. Campbell*,[122] before the court in 1964, a grantor executed a royalty deed providing for conveyance of a royalty of one-half of the whole of the oil, gas, or other minerals, except sulphur, for delivery of royalties to the purchaser as provided by the existing lease or any future lease upon the land and for payment of royalties out of royalties reserved to the mineral lessor. The grantee argued that the royalty conveyance was plain and unambiguous and needed no interpretation by the court and that the royalty was one-half of the whole of any oil, gas, and other mineral produced from the lands. The court said that this might be true if the conveyance was considered in a vacuum separate and apart from the lease and without considering the circumstances of the parties and the subject matter. However, when the royalty conveyance was applied to the lease, it was ambiguous. Therefore, evidence showing all the circumstances surrounding the transaction was admissible. The court observed that the usual royalty provided for in Mississippi leases prior to and at the time the royalty deed was executed was a one-eighth of the whole of all oil, gas, and other minerals, except sulphur.

It observed that the then existing lease provided for a one-eighth royalty, and that it would be impossible to pay a one-half royalty out of or to deduct a one-half royalty from the royalty under the present or any future lease. It found that the amount paid for the royalty deed was consistent with royalty values if the royalty conveyed by it was interpreted as one-half of one-eighth instead of one-half of the oil and gas produced. The court stated that if the conveyance was interpreted to transfer a one-half of the whole of any oil and gas produced it would be impossible to give it effect, it would not harmonize with prevailing values, and it would be contrary to the manifest intention of the parties. However, if it was interpreted to mean one-half of one-eighth royalty, the conveyance applied to the lease on which it operated without any unreasonable or unfair result, and it would be in accord with the manifest intention of the parties as well as the usages of the oil business. The court concluded that by looking to the subject matter, the particular situation of the parties, all of the conditions surrounding the parties at the time the instrument was executed, and to what might be fairly assumed they had in contemplation thereto, the parties contemplated a conveyance of one-half of the royalty under the existing or any future

[122] 250 Miss. 227, 164 So. 2d 780 (1964).

lease, or one-sixteenth of the whole of the oil, gas, and other minerals produced from the land. Incidentally, the court defined a "royalty acre" as that part of the interest in the one-eighth of the oil produced from one acre. No doubt, it meant to include gas also. The Mississippi court has not defined the term "mineral acre," but the definition in *Oil and Gas Terms* by Williams and Meyers is that a "mineral acre" is the full mineral interest in one acre of land. The use of either term in describing land is not recommended.

One final case upon quantum is *Thornhill v. Ford.*[123] There was a grant by Marion County of land in fee "and an undivided one-half interest in all gas, oil and/or other minerals on or under said lands above conveyed." The deed concluded by reciting that the grantor "retains" a one-half mineral interest. The grantee argued that while the county had statutory authority to sell the land, it had no authority to reserve any part of it. The mineral reservation was therefore void, and the grantee took the land in fee. The court held that the county "kept" one-half of the minerals. It recognized that the county had no authority to "reserve" but it said that the county did not reserve or except. It simply sold the surface and one-half of the minerals. It could sell the whole or any part of it under the rule that a power to sell a fee ordinarily includes the power to sell a lesser estate or interest. The court observed, however, concerning only the grant of the fee and one-half of the minerals, that unless the county intended to "retain" a one-half mineral interest, the language reading "[A]nd an undivided one-half interest in all gas, oil and/or other minerals on and under said lands above conveyed" would be wholly meaningless, indicating that if this situation existed in a transaction between private parties and after the grant in fee it was stated that the grantor was retaining a one-half mineral interest, the grantee would nevertheless receive only a one-half mineral interest and the surface, with the other one-half mineral interest remaining in the grantor.

4. *Grants Containing Reservations or Exceptions Where Part of Minerals Outstanding.* It is well settled in Mississippi that when a grantor conveys land by warranty deed there passes to the grantee title to all of the fee except that which is expressly reserved or excepted. If, therefore, a grantor conveys and warrants the land less and except a one-half mineral interest, at a time when a one-half mineral interest is outstanding in a third party, the grantor conveys all that he owns and retains nothing for himself.

In *Richardson v. Moore*[124] Haskins-Moore Lumber Company conveyed to Smith by a warranty deed which contained the following: "Also, reserving the oil and mineral rights on the said lands together with the right to enter upon, explore for and remove the said oil and

[123] 213 Miss. 49, 56 So. 2d 23 (1952).
[124] 198 Miss. 741, 22 So. 2d 494 (1945).

mineral in accordance with a deed made to us by the Edward Hines Yellow Pine Trustees, conveying to us the said land." The deed from the Hines Yellow Pine Trustees to Haskins-Moore Lumber Company was not then before the parties. It later developed that such deed contained no reservation or exception. Nevertheless, Haskins-Moore Lumber Company insisted that by the above quoted provision it reserved the mineral estate and its grantee, Smith, took only the surface. The court disagreed, because the grantor inserted the mineral reservation in the deed merely to protect its warranty. The court said that if the grantor intended to retain the minerals for itself, there was no need to use the quoted language. The grantor could have said more easily "But all minerals are hereby excepted." In this case the court found the deed ambiguous and admitted evidence to show the surrounding circumstances which revealed that the subsequent conduct of the grantor was inconsistent with any claim of mineral ownership.

Fatherree v. McCormick[125] presented a situation where the Federal Land Bank of New Orleans, as owner of the entire tract, conveyed it to Fatherree and Skelton with reservation of one-half of all mineral rights. Fatherree then executed a deed to McCormick which recited that he conveyed and warranted his "undivided interest" in the land, describing it, "less and except one half of the mineral rights." He thereafter contended that he reserved one-half of his one-fourth, or a one-eighth mineral interest. The court held that he reserved nothing. He had merely borrowed the description, including the reservation, which had been employed in the former deed by the land bank. The court, in a rare instance of making the ancient distinction between a reservation and an exception, but only for the purpose of rationalizing, said that Fatherree's contention could be supported only if the exclusion of one-half of all mineral rights was a reservation rather than an exception, for a reservation could only be of some portion of the thing granted and vested in the grantor under the theory of regrant. By this test the grantor could not reserve one-half when he owned only one-fourth, for he would be receiving back more than he had. Moreover, Fatherree's deed did not say that the excepted one-half of *his* undivided interest, but one-half of *all* mineral rights. One-half of all mineral rights included all that he had, and indeed twice as much.

In *Salmen Brick & Lumber Co., Ltd. v. Williams*[126] the grantor had received a deed containing an exception of one-half minerals. It then conveyed the property to another by warranty deed containing an exception in the identical language expressed in the first deed. In rejecting the contention that this constituted an additional retention of the remaining one-half minerals the court, applying the rule that where a deed is

[125] 199 Miss. 248, 24 So. 2d 724 (1946).
[126] 210 Miss. 560, 50 So. 2d 130 (1951).

susceptible of two constructions, the construction more favorable to the grantee will be adopted, held that the second exception was employed so that the grantor would be conveying under warranty only what he owned, and that he retained no interest in the minerals.

In *Garraway v. Bryant*[127] a grantor, owning the surface and only one-half of the minerals, conveyed the land with reservation of one-half of the minerals, without mentioning the one-half mineral interest already outstanding. The court held that the deed conveyed and warranted whatever it failed to exclude. By excluding only one-half of the minerals it conveyed and warranted the other one-half. The word "reserved" would be treated as "excepted" and applied to the outstanding one-half.

In *Brannon v. Varnado*[128] Brannon, who owned only the surface and one-half of the minerals, conveyed and warranted to Varnado the land, but undertook to except from the conveyance and reserve unto himself a one-fourth mineral interest. The court said:

> As stated, Brannon was vested with only half of the minerals. He warranted title to Varnado to three-fourths of the minerals. The question is could Brannon retain one-fourth of the minerals when he warranted the title to three-fourths and didn't own but one-half. Inclusion within the warranty of the one-fourth interest attempted by Brannon to be reserved would yet have resulted in a default of one-fourth of the minerals to Varnado. In other words, reservation of the one-fourth was contrary to, and in direct violation of, the obligations of Brannon under his warranty. He could not convey and warrant and reserve and retain the same thing at the same time. His warranty obligation was superior to his reservation rights.[129]

In *Lucas v. Thompson*[130] the grantor owned only the surface and one-half of the minerals and undertook in his warranty deed to reserve one-half of the minerals without any other mention of minerals. The court held that by so doing he conveyed and warranted the one-half of the minerals that he owned. The court said that it was error to admit oral testimony that the grantor thought he owned all minerals and did not know one-half of the minerals was already outstanding. There was no ambiguity in the deed. The grantor obviously could not convey the one-half that he owned and at the same time retain it, and his warranty obligation was paramount.

A warranty deed was involved in all of the above cases. Would the court reach the same conclusion if the grantor conveyed by a special warranty deed or by a quitclaim deed?

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[127] 224 Miss. 459, 80 So. 2d 59 (1955).

[128] 234 Miss. 466, 106 So. 2d 386 (1958).

[129] *Id.* at 469, 106 So. 2d at 387.

[130] 240 Miss. 767, 128 So. 2d 874 (1961).

A special warranty deed was interpreted in *Merchants & Manufacturers Bank v. Dennis.*[131] The bank had title to the land except for a one-half mineral interest owned by a predecessor in title. It conveyed the land by special warranty deed containing the following provision:

> It being especially understood and agreed that one-half of the oil, gas and mineral rights are reserved by the grantor and not deeded herein. A right of way over to and across said land is reserved for the purpose of exploration or utilization of said oil, gas or minerals and that the payment of existing leases, having already been assigned, is not included. Any further lease money or royalty money received for the one-half owned by said Welch is to be applied to the reduction of the within described indebtedness. . . .[132]

The indebtedness referred to was purchase money secured by vendor's lien. The court rejected the bank's argument that it reserved the one-half mineral interest which it owned. It said that this case was controlled by *Salmen Brick & Lumber Co. v. Williams*[133] and *Garraway v. Bryant.*[134] The bank vigorously insisted that the rule should be different, since a special warranty deed was involved, while the deeds in the *Salmen* and *Garraway* cases were warranty deeds. The court responded:

> [B]ut in view of the above mentioned statement as to lease money or royalty money received for the one-half owned by Welch, we are of the opinion that this is a recognition by appellant (that is, the bank), that Welch was receiving a one-half mineral interest under the deed and it makes no difference that the conveyance was only by special warranty deed. Our conclusion would be the same if it were only a quitclaim deed.[135]

What would have been the court's decision if the added language concerning lease and royalty payments had not appeared in the special warranty deed? We can only speculate.

In cases involving warranty deeds, as pointed out by Williams and Myers[136] in a very fine discussion of the whole matter, two rationales are offered to sustain the rule that the grantor retains nothing. Both rationales are discussed in the bellwether case of *Duhig v. Peavy-Moore Lumber Co.*[137] The first is that a warranty deed by a grantor owning

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[131] 229 Miss. 447, 91 So. 2d 254 (1956).

[132] *Id.* at 452, 91 So. 2d at 255.

[133] 210 Miss. 560, 50 So. 2d 130 (1951).

[134] 224 Miss. 459, 80 So. 2d 59 (1955).

[135] Merchants & Manufacturers Bank v. Dennis, 229 Miss. 447, 454, 91 So. 2d 254, 256 (1956).

[136] 1 WILLIAMS AND MEYERS § 311.

[137] 135 Tex. 503, 144 S.W.2d 878 (1940).

only the surface and an undivided one-half mineral interest manifests an intention to convey all that the grantor owns, and the reservation clause merely withdraws from the operation of the deed the one-half mineral interest that the grantor does not own. The second rationale is that the grantor retains the one-half mineral interest that he owns, but his warranty is breached when he executes the deed purporting to cover the surface and one-half minerals. He then becomes, under the after-acquired property rule, estopped to assert his reservation. The result is that the grantee owns a one-half mineral interest, the grantor retains nothing, and the other one-half mineral interest remains outstanding in other persons. If this were not so, the grantor would hold the very interest required to remedy the breach of warranty, which would result in a contradiction of the warranty. The Mississippi Supreme Court has explicitly followed the theory that the grantor has affirmatively conveyed the one-half interest in question, but it has also greatly emphasized the breach of warranty in holding for the grantee.

In discussing deeds without warranty, Williams and Myers conclude as follows:

> The analogy to orthodox estoppel by deed being clear, the question would seem to turn on whether the jurisdiction requires a warranty (or other title covenant) for estoppel by deed to apply. Opinion differs, the older rule requiring a title covenant. But what of a deed without warranty but supported by valuable consideration? While those jurisdictions requiring a title covenant forestopped would presumably hold for the grantor . . . , it is suggested that the better rule protects a grantee who, by purchase for value, has relied on the representations and undertakings of the deed. Lastly, there is the question of a deed without a warranty and without consideration. Here no basis for protecting the grantee can be perceived: there is no valuable consideration to raise an estoppel based upon detrimental reliance on a representation or undertaking and no warranty to raise an estoppel by deed. Although we have discovered no cases on this question, it is noteworthy that in the cases passing the after-acquired title to a donee, the deeds contained a covenant of title.[138]

Without undertaking to reach a conclusion, attention is called to the fact that in Mississippi a special warranty deed binds the grantor, his heirs, and personal representatives to forever warrant and defend the title of the property unto the grantee and his heirs, representatives, and assigns against the claims of all persons claiming by, through, or under the grantor;[139] that a conveyance without any warranty operates to transfer the title and possession of the grantor as a quitclaim and

[138] 1 WILLIAMS AND MEYERS § 311.1 at 583-84.

[139] MISS. CODE ANN. § 844 (1956).

release;[140] and that a quitclaim and release shall be sufficient to pass all the estate or interest of the grantor in the land conveyed, and it estops the grantor and his heirs from asserting a subsequently acquired adverse title to the lands conveyed.[141]

It is well settled that the grantor and all persons in privity with him are estopped from denying that he was seized of the property which his deed purported to convey at the time his deed of conveyance was executed.[142] This rule applies to any deed and, as above shown, is by statute expressly made applicable to quitclaim deeds. However, the corollary is true, and the estoppel is coextensive only with the estate, right or interest which the deeds purports to convey. The Mississippi Supreme Court has held that where a grantor conveyed all her right, title and interest in land inherited from her father, she is not estopped to assert title which she later acquired by inheritance from her sister and brother, although they likewise had inherited from their father, because her deed did not purport to convey any estate that the grantor might at a future day derive by descent from her co-heirs.[143] Again, our court has held that where a grantor quitclaimed "all of his right, title and interest" in all minerals in land, he was not estopped to assert title to minerals which he thereafter acquired, because his conveyance was specifically limited to the minerals to which he had title when he conveyed.[144] A quitclaim deed of the minerals, rather than a quitclaim deed of the grantor's right, title, and interest in the mineral, would have invoked the estoppel under section 846 of the Mississippi Code.

In the last analysis it would appear that the Mississippi court might well hold either (1) that where the grantor owned the surface and one-half minerals and conveyed the land with reservation of one-half minerals, he will be treated as having withheld only the one-half minerals that he did not own, regardless of whether he conveyed by warranty, special warranty, or quitclaim deed; or (2) that if he withheld the one-half minerals that he owned, in addition to the one-half interest owned by his predecessor in title, he is estopped to deny that he conveyed a one-half interest, and the grantee has it under either theory.

Operation and Effect

Space will permit no more than bare mention of some consequences of severance of minerals from the surface, whether by reservation, exception, or grant. This is done as follows:

1. As pointed out in the beginning, severance of minerals creates a

[140] Miss. Code Ann. § 845 (1956).
[141] Miss. Code Ann. § 846 (1956).
[142] Meyers v. American Oil Co., 192 Miss. 180, 5 So. 2d 218 (1941).
[143] McInnis v. Pickett, 65 Miss. 354, 3 So. 660 (1888).
[144] McLaurin v. Royalties, 231 Miss. 240, 95 So. 2d 105 (1957).

separate and distinct estate from the surface. Mississippi is an ownership state, and the severed mineral owner owns his minerals as absolutely and unqualifiedly as the surface owner owns the surface.[145]

2. After title to the surface estate has been severed from the title to the underlying mineral estate, title to the minerals cannot be acquired by adverse possession of the surface alone.[146] However, where the adverse possession of the surface began before mineral severance, it will continue and will operate against the surface and minerals as if there had been no severance.[147]

Also, where there is a severance of minerals by an adverse possessor, the continued adverse possession of the surface by the severor or severee inures to the benefit of the severed mineral estate whether he conveys the surface and reserves the minerals, or retains the surface and conveys the minerals.[148] Upon severance, the severed mineral owner takes constructive possession of the mineral estate, although the grantor retains title and actual possession of the surface.[149]

3. The severed mineral estate, if non-producing and if created prior to June 10, 1946, is assessable ad valorem,[150] unless an exemption thereof has obtained under the Mineral Documentary Stamp Tax Act.[151] Such exemption may have resulted from application therefor duly filed or by transfer, on or since June 10, 1946, requiring payment of recording tax.[152] Where no exemption has obtained, the interest created prior to June 10, 1946, has remained assessable, but back-assessment is limited to seven years.[153] While such interest may remain taxable, an assessment of and payment of taxes on the land as such (although land ordinarily includes surface and minerals) will not constitute an assessment of and payment of taxes on the severed minerals; but a tax sale of the land will carry surface and minerals where the minerals have not been separately assessed.[154]

4. Also heretofore pointed out, the severed mineral owner has the implied or incidental right of entering, occupying and making such use

[145] Stern v. Great Southern Land Co., 148 Miss. 649, 114 So. 739 (1927).

[146] Aultman v. Kelly, 236 Miss. 1, 109 So. 2d 344 (1959).

[147] Huddleston v. Peel, 238 Miss. 798, 119 So. 2d 921 (1960), *suggestion of error overruled,* 238 Miss. 798, 120 So. 2d 776 (1960).

[148] Carlisle v. Federal Land Bank, 217 Miss. 289, 64 So. 2d 142 (1953).

[149] Neal v. Teat, 240 Miss. 35, 126 So. 2d 124 (1961).

[150] Miss. Code Ann. § 9770 (1956).

[151] Miss. Code Ann. § 9701-01 to -11 (1956).

[152] Miss. Code Ann. § 9701-03 (1956).

[153] Miss. Code Ann. § 9821 (Supp. 1966).

[154] Stern v. Parker, 200 Miss. 27, 25 So. 2d 787, *suggestion of error overruled* 200 Miss. 27, 27 So. 2d 402 (1946).

of the surface as is reasonably necessary in exploring, mining, removing, and marketing the minerals.[155]

5. The owners of the separate mineral and surface estates should have due regard for each other, and should exercise the degree of care and use that this regard demands. The surface owner has the right to enjoy the land free from annoyance except as reasonably arises from exploration and drilling operations on the part of the mineral owner. The mineral owner is not limited in his operations because his acts may cause inconvenience to the surface owner, but his operations must be reasonable and not cause unnecessary inconvenience.[156]

6. Parties owning undivided interests in underlying minerals in land are tenants in common. However, the general rule is that the owner of the surface and mineral rights are held by separate and distinct titles in severalty, and each is a freehold estate of inheritance separate from, and independent of, the other. As has already been pointd out, the Mississippi Supreme Court treats the estates as separate and distinct and would be expected to follow the general rule that the respective owners are not cotenants. In *Day v. Hogans*[157] it was stated that the separate owner of growing timber was not a tenant in common with the surface owner, although each had certain rights as against the other. Where the severance of minerals is merely of an undivided interest, the different mineral owners are tenants in common, although one may also own the surface.

Conclusion

The law of mineral reservations and exceptions can be, and certainly is to the parties to a deed containing a reservation or exception, more than a matter for academic titillation. In preparing such deeds, therefore, the attorney should be sure that he fully understands what the parties desire to do, and that he is alert and careful to make the deed express their intentions.

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[155] Gulf Refining Co. v. Davis, 224 Miss. 464, 80 So. 2d 467 (1955).
[156] Union Producing Co. v. Pittman, 245 Miss. 427, 146 So. 2d 553 (1962).
[157] 130 Miss. 128, 93 So. 578 (1922).

THE ECONOMIC OPPORTUNITY ACT

*Russell Troutman**

Among the prodigious volumes written about the Legal Service Program of the Office of Economic Opportunity, a sparsity in comparison with the whole has been directed to the constitutional aspects of the Economic Opportunity Act,[1] which spawned the program.

When OEO first included legal services within its ambit, not the slightest reference to legal services was in the act, as contrasted with Job Corps, which was clearly delineated.

This vast and expensive program that will shape the lives of so many was instituted nationwide on the authority of 42 U.S.C. section 2785:

> Financial assistance for conduct and administration of community action programs—Authorization to make grants to, or to contract with, public or private non-profit agencies for payment of costs.
>
> a. The Director is authorized to make grants to, or to contract with, public or private non-profit agencies, or combinations thereof, to pay part or all of the costs of community action programs which have been approved by him pursuant to this part, including the costs of carrying out programs which are components of a community action program and which are designed to achieve the purposes of this part. Such component programs shall be focused upon the needs of low-income individuals and families and shall provide expanded and improved services, assistance, and other activities, and facilities necessary in connection therewith. Such programs shall be conducted in those fields which fall within the purposes of the part including *employment,* job training and counseling, health, vocational rehabilitation, housing, home management, welfare, and special remedial and other non-curricular educational assistance for the benefit of low-income individuals and families. (Emphasis added.)

Later, this was amended by adding four words—"but not limited to"—just before the word "employment" near the end of the paragraph quoted above,[2] but there was still no reference to legal services. It was not until November of 1966, when the program had been implemented almost two years, and after the outlay of many millions of dollars, that

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[1] 42 U.S.C. §§ 2701-2981 (1964).

[2] 42 U.S.C. § 2785(a) (Supp. 1966), *amending* 42 U.S.C. § 2785(a) (1964).

Title II of the Economic Opportunity Act was further amended by adding the following:

> b. In carrying out Sections 2784 and 2785 of this title, the Director shall carry out programs eligible for assistance under such Sections, which provide legal advice and legal representation to persons when they are unable to afford the services of a private attorney, together with legal research and information as appropriate to mobilize the assistance of lawyers or legal institutions, or combinations thereof, to further the cause of justice among persons living in poverty. . . .[3]

One explanation to the dearth of material written on the constitutionality of legal services under the Economic Opportunity Act could be attributed to the support of the American Bar Association and other prestigious groups. Although it is fair to assume their support favors the concept and spirit of the program with federal expenditures in an area heretofore unexplored, and that they see nothing about the tenth amendment of the Constitution, which reserves to the states those powers not specifically granted to the federal government, that presents a barrier, their support does not constitute legal authority that the legislative requirements of representative government have been met.

When it happens that a revolutionary movement such as legal services affecting all citizens is effected without specific approval by our elected representatives, and no challenge is made because the bar, in this instance, favors the philosophy of the program, a precedent is established whereby not only *Schechter Poultry Corp. v. United States*,[4] is overruled, but the Constitution as cited in the *Schechter* case, and particularly article I thereof, is also no longer the law; and we are left wandering in a wilderness of confusion as to the responsibility of the elected representatives of the people and uncertain as to whom we should look for the enactment of our laws. We would soon be in a position where we would not know the source to which we might go and find the laws under which we are required to live. At least under the system which has prevailed in this country over many years, a person subject to the laws of this land could go to the statute books and legal decisions and find delineated there legislative action and court decisions bearing thereon.

If the Director of the Office of Economic Opportunity is given discretion to create a complex legal service program by regulations that have the effect of law under the broad legislative enactment of "combating poverty," then there may be no limit to congressional authority to delegate until finally there would be no need for Congress at all. One director's job may be to fight crime, another to defend us from our

[3] 42 U.S.C. § 2792 (Supp. 1967).

[4] 295 U.S. 495 (1935).

enemies, another to regulate commerce, to levy and collect taxes, or pool all the nation's wealth and redistribute it equitably either under a guise of combating poverty or some other justification, and leave to each director's discretion the procedure and mechanics he might employ to accomplish his broad goal.

The purpose of this article is to challenge the mind of the reader to grapple honestly with the question: Does the Economic Opportunity Act improperly delegate authority to the Office of Economic Opportunity or its Director?

The Constitution of the United States vests in Congress the legislative powers enumerated in article I. The doctrine that Congress cannot delegate this authority to an administrative agency of the executive branch is fundamental to the general principle of separation of powers.

Notwithstanding this general principle, it is generally recognized that Congress may confer a considerable amount of discretionary authority in administrative agencies. The authority so delegated, however, cannot be so broad as to be unlimited.[5] The congressional delegation of such discretionary powers must prescribe a sufficiently definite standard from which both the agency to which the authority is granted and the courts may determine the limitation or extent of the agency's powers.[6]

The only guidelines available under the Economic Opportunity Act which would be applicable to a legal services program are found in the policy statement of 42 U.S.C., section 2701, and 42 U.S.C., section 2785. The policy statement at 42 U.S.C., section 2701, indicates that the purpose of the Act is:

> [T]o eliminate the paradox of poverty in the midst of plenty in this Nation by opening to everyone the opportunity for education and training, the opportunity to work, and the opportunity to live in decency and dignity.

The first words of the policy statement setting forth the purpose of the Act are "to eliminate the paradox of poverty in the midst of plenty in this Nation . . ." These words set out the battle cry of the war on poverty, but the enemy in that war lacks definition and cannot be identified. What is poverty? Has Congress pointed out the enemy to the Director? It would seem not. It would seem that the job of defining the enemy is left to the general in the OEO army—the Director. Under the Economic Opportunity Act the Director can decree that persons making less than 3,000 dollars per year, or perhaps 10,000 dollars per year, are poverty stricken. There is no prohibition or remedy in the event the Director declares a 50,000 dollar per year person unable to afford a private attorney. How many variables may be used by the Director in

[5] United States v. Chicago, Milw., St. P. & Pac. R.R., 282 U.S. 304, 324 (1931).
[6] *Id.*

defining poverty—without any standard having been prescribed by Congress? Certainly the policy statement of the Economic Opportunity Act does not tell the Director what poverty is. The Economic Opportunity Act leaves this determination to the unfettered discretion of the Director, without any guidelines or limits.

The provisions of 42 U.S.C., section 2792, attempt to further define the persons to whom the Act is to apply. It says the Act applies ". . . to persons when they are unable to afford the services of a private attorney . . . ." It would seem, however, that this attempt falls short of its goal, for again the discretion of the Director is wholly unconfined in his authority to determine who is or who is not "unable to afford a private attorney." The Act seems to ignore the distinction between a person who is economically poor and a person who is unable to afford an attorney.

An example of this distinction is the migrant farm worker involved in an automobile accident for which he may be entitled to a substantial monetary recovery. Cases such as this are traditionally handled by private attorneys on a contingency basis under which they receive fees only if there is a recovery for the client. While such a man may very well be economically poor, he is not "unable to afford a private attorney." Yet, according to the Economic Opportunity Act, it is within the Director's unlimited power and authority to say that such a person qualifies for the benefit of the Act. The fact that the Director may announce he will not take contingent fee cases is immaterial since his announcements are not law, not binding on his successors, and subject to variation from locality to locality and to change from day to day.

The policy statement[7] continues and requires the opening of "the opportunity for education and training" for everyone. When applied to the Director's legal services program, this phrase likewise fails to delineate the extent of the Director's authority. Is he to educate persons as to their need for an attorney or as to what an attorney may be able to do for them? Is he to commission an investigator or neighborhood aide to pry into a person's life and business dealings to see what sort of unlitigated causes of action may happen to be lying around? Certainly the Act is silent in this respect. It is left to the Director's unlimited discretion. He may have already hinted at how that discretion will be exercised, for his publication, GUIDELINES, states that

> A strong "preventive" law approach should be established; educating potential clients to become aware of their legal rights and to protect them so that legal remedy sought after involvement will be the exception rather than the rule.
> The proposal should state the method of preventive law. For example, this process may include discussions with church

[7] 42 U.S.C. § 2701 (1964).

> groups, block clubs, and other groups of poor people to inform them of their legal rights and the availability of the legal services program; a bar association may prepare and distribute model forms of installment contracts and leases; and public agencies may be encouraged to inform poor people that legal counsel is available.[8]

Already the Director's discretion has allowed him to equate "education" with solicitation, as can be seen from the above quotation. He plans to put forms into the hands of laymen when every trained attorney realizes that forms are dangerous when used indiscriminately.

In a similar instance in which Congress conferred "virtually unfettered" discretion in a broad non-technical area such as this, without limitation by established legal concepts incorporated into an intelligible and definite standard, the United States Supreme Court held the delegation of power to be invalid. In *Schechter Poultry v. United States*[9] Mr. Justice Cardozo's concurring opinion states the principle as follows:

> The delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant, if I may borrow my own words in an earlier opinion. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 440.
>
> This Court has held that delegation may be unlawful though the act to be performed is definite and single, if the necessity, time and occasion of performance have been left in the end to the discretion of the delegate. *Panama Refining Co. v. Ryan, supra.* I thought that ruling went too far. I pointed out in an opinion that there had been "no grant to the Executive of any roving commission to inquire into evils and then, upon discovering them, do anything he pleases." 293 U.S. 338 at p. 435. Choice, though within limits, had been given him "as to the occasion, but none whatever as to the means." *Ibid.* Here, in the case before us, is an attempted delegation not confined to any single act nor to any class or group of acts identified or described by reference to a standard. Here in effect is a roving commission to inquire into evils and upon discovery correct them.[10]

As in the *Schechter* case the delegation in the Economic Opportunity Act also amounts to "a roving commission to inquire into evils and upon discovery correct them." The policy statement in the act does not include "any established legal concepts" that would allow the Court to limit the exercise of discretion as required by the *Schechter* ruling.

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[8] Office of Economic Opportunity, Guidelines for Legal Services Programs at 25.

[9] 295 U.S. 495 (1935).

[10] *Id.* at 551.

Continuing with a comparison of the delegation of authority presently under attack and that which was struck down in *Schechter*, the parallel becomes even more evident. The Economic Opportunity Act and its policy statement provide no opportunity for notice and hearing or other procedural safeguards that allow for appropriate findings of fact supported by adequate evidence justifying a legal services program. There is no way to determine the need for a legal services program and no way provided to challenge its operation.

Further, the Act provides no statutory allowance for judicial review that insures fairness—a right which was a prime concern in the *Schechter* case. The double delegation of authority by the Director to private and local groups is closely analogous to the invalid delegation in *Schechter* to "trade or industrial" groups despite the assurance that such groups were "familiar with the problems of their enterprises." Finally, the delegation destroys the independence of the departments of government by the vesting of judicial discretion in the Director and other officers of the legal services programs to regulate and dictate to the attorneys participating in the program and who as lawyers are themselves officers of the judicial branch of government.

In virtually all the cases where broad delegation of power has been upheld, the delegation was made in technical or scientific fields; for example, in those complex areas where the administrator of a program must by necessity have broad powers and in which the administrator must also by necessity have expertise and training. In *American Power & Light Co. v. Securities and Exchange Commission*,[11] the Supreme Court concluded that the SEC was a group sufficiently "familiar with corporate realities" to handle a broad grant of power for the purpose of regulating the spread of holding companies in the field of electric utilities. In *Yakus v. United States*[12] the Court dealt with a delegation of power with respect to the technical field of price stability. In *NBC v. United States*[13] it was the field of radio broadcasting. Mergers of common carriers were dealt with in *New York Central Securities Corporation v. United States*.[14] In the case of *Arizona v. California*[15] the Supreme Court ruled upon a delegation of power in the technical area of apportioning water during times of shortages, and in *Carlson v. Landon*[16] the Court acknowledged the technical nature of regulating aliens and their deportation. In all of these cases it would have been extremely difficult for Congress to establish guidelines in the fields involved.

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[11] 329 U.S. 90 (1946).
[12] 321 U.S. 441 (1944).
[13] 319 U.S. 190 (1943).
[14] 287 U.S. 12 (1932).
[15] 373 U.S. 546 (1963).
[16] 342 U.S. 524 (1952).

Unlike these cases, eradication of poverty is not of such a highly technical nature that Congress is entirely lacking in knowledge of either the amount of power necessary to accomplish that objective or the methods which must be utilized to such a degree that it is necessary that it vest "unfettered" power in the administrator or the program. Congress certainly has sufficient experience with, knowledge of, and insight into the social and economic problems surrounding the area of poverty that it is capable of establishing more definite criteria for the utilization and exercise of delegated powers by the administrator of the program than it has established in the policy statement of the Economic Opportunity Act. Having such ability, Congress should be required to do just that, and anything short of that should be adjudged to be an unconstitutional delegation.

Truly as a matter of example, the following guidelines could very easily be a part of the act without interfering with the flexibility of the program.

1. Lawyers rendering legal services should be authorized to practice in the state where the services are provided.

2. Programs are not to provide free legal advice in fee generating cases such as contingent fee cases or other cases in which a fee provided by statute or administrative rule is sufficient to retain an attorney.

3. A program should not duplicate existing legal services.

There are many other areas that should be covered by the act and which are unnecessary to leave to the discretion of the Director, such as the disposition of unexpected fees or costs awarded by the court. Suppose, for instance, an indigent presents a traditionally contingent fee case which no private attorney will take without a cost deposit which the indigent does not have. Suppose further that an OEO-funded lawyer takes the case and effects a recovery. Does the indigent client get the entire recovery without a deduction for attorneys' fees which could be used to finance the program further, and will the taxpayers be reimbursed for the costs expended and thus relieve our budget by that amount? It would be a simple matter to so provide in the act. Such a provision is not so technical or so restricting to the effectiveness of the program as to justify no guideline at all. The act should provide that before a program can be instituted in a given area, a showing of inadequacy in that area must be made. Types of legal matters to be handled and methods and indicia for determining those who cannot afford a private attorney should also be a part of the act. A 50,000 dollar per year person might be unable to afford a private attorney where he desires to hire one to obtain a divorce, draw a will, plan his estate, or appeal in tax court. With no guidelines as to types of matters to be handled or indicia of poverty and no remedy for abuse, this could easily happen.

Assuming for purposes of argument that the congressional delegation of power conferred in the Economic Opportunity Act is a proper one, the publication of the Office of Economic Oportunity, entitled GUIDELINES, clearly indicates activities on the part of the Director which extend far beyond the statutory authority given to the Director.

Section 2792 of 42 U.S.C. is the only statutory reference to the authority of the Director to carry out OEO programs involving legal services. This section only authorizes the Director to provide "legal advice and legal representation." It does not authorize attacks on legislation as a medium of social reform; yet the Director has funded and further intends to fund, programs which according to the OEO publication GUIDELINES would include such activities as evidenced by the following passage from that publication:

> Advocacy of appropriate reforms in statutes, regulations, and administrative practices is a part of the traditional role of the lawyer and should be among the services afforded by the program. This may include judicial challenge to particular practices and regulations, research into conflicting or discriminating applications of law or administrative rules and proposals for administrative and legislative changes.[17]

Clearly, if Congress had intended the Director to have the power to do these and other things mentioned in the GUIDELINES, they would have specifically expressed that intent in the words of the statute. However, no such power is, in fact, granted in the Act.

The scope of the services to be rendered through OEO funds extends far beyond those customarily envisaged by traditional charitable societies. According to the OEO's own GUIDELINES:

> There should not be an arbitrary limit to the scope or type of civil legal services provided to eligible clients. All areas of civil law should be included and a full spectrum of legal work should be provided; advice, representation, litigation, and appeal . . . .[18]

Such objectives cannot be said to be those customarily attributable to a charitable society. Yet, the Act itself is silent regarding the scope of legal services to be rendered. One decision by an appellate court of a state on the organization of an OEO legal services program is *Application of Community Action for Legal Services, Inc.*[19] In that case the court made the following objections to the OEO legal services program:

> The interposition of supervising licensed corporations and the unlimited power of contracting out of legal services to delegate,

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[17] OFFICE OF ECONOMIC OPPORTUNITY, GUIDELINES FOR LEGAL SERVICES PROGRAMS at 23.

[18] *Id.* at 22.

[19] 26 App. Div. 354, 274 N.Y.S.2d 779 (1966).

> sub-delegate, and sub-sub-delegate agencies is a thicket through which none could penetrate, even if the non-lawyer controls were eliminated.[20]
>
> No matter how many interpositions of corporations and boards are provided, with respect to each proposed corporation, the lawyer operations would be subject ultimately to lay control. This is not permissible if the public is to be protected from abuses and if this Court is to carry out its responsibility to enforce minimum standards on those over whom it has direct control.[21]
>
> [I]n any legal assistance corporation, supported by federal anti-poverty funds, the executive staff, and those with the responsibility to hire and discharge staff from the very top to the lowest lay echelon must be lawyers. . . .
> The management of law offices is not something in which even involved members of the community may be deemed to be competent. No one would assume that patients are competent to tell physicians how to practice their professions.[22]
>
> At this point, it may be helpful to note that those who sponsor a legal assistance corporation need not be lawyers. But once a licensed corporation is created, it could and should be cut loose from the sponsors, if they are not lawyers or cannot meet the standards required for operation of a legal assistance corporation.[23]
>
> At least one of the applications is deficient in not setting forth precisely the standards of eligibility for prospective clients.[24]

Regarding the absence of either the Economic Opportunity Act or the published GUIDELINES of the Office of Economic Opportunity to set forth precisely the standards of eligibility for prospective clients, the court went on to say:

> The proposals for referral of ineligible clients to lawyers are deficient in being subject to easy abuse, discrimination among available lawyers, and even corruption, especially when considered in conjunction with the relatively unrestricted use of the laymen as "investigators" for the neighborhood law offices. The applications are gravely deficient in not setting up standards and controls over laymen to be employed outside the law offices. . . .
>
> Each of the pending applications in setting forth purposes is unsatisfactory in the indiscriminate mingling of social goals and legitimate legal practice.[25]

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[20] *Id.*, 274 N.Y.S.2d at 786.
[21] *Id.* at 787.
[22] *Id.*
[23] *Id.* at 787-88.
[24] *Id.* at 788.
[25] *Id.* at 788-89.

To be contrasted with the seven lines that are devoted to legal services in the Economic Opportunity Act is the act authorizing Medicare, which is quite lengthy and lucid regarding the types of medical cases to be handled under the Act, exceptions, method of selecting doctors, and method of payment, among many other guidelines.

Even if the Economic Opportunity Act as it now exists were authorized by the Constitution, it cannot be argued successfully that the Director is in a better position to set up these standards than members of Congress. They are more representative of the people and certainly have more information available at hand for the formulation of such a mammoth program as this. It is because of the fact that there is a representative government that Congress was entrusted by the Constitution with power, and the sole power, to legislate.

Another void in the Economic Opportunity Act is the absence of a prerequisite that attorneys employed by such programs be subject to all technical and legal requirements of the particular jurisdiction in which the program operates. Even if the Director maintains that attorneys employed are subject to the legal requirements of the particular jurisdiction in which a program operates, there is nothing in the Act itself to insure this, and its present policy is subject to change at the whim and caprice of the Director or his successors. There is certainly no limitation contained in the Act as passed by Congress to that effect. All the Act says in this respect is the following:

> Provided, that the Director shall establish procedures to assure that the principal local bar associations in the area to be served by any proposed program of legal advice and representation are afforded an adequate opportunity to review the proposed program and to submit comments and recommendations thereon before such program is approved or funded.[26]

This is far from a requirement that the employees of the agencies established by the government under this Act must comply with state law with respect to the observance of the ethics, practices, and membership of the local bar. The Act establishes no standards by which these lawyers subsidized by the federal government shall be integrated into the state system which admits, controls, and disciplines those permitted to practice law in the state. This situation is demonstrative of the plenary grant of authority and the total inadequacy of the act of Congress in setting the boundaries and standards required in this program.

Another argument that has been made in answer to constitutional inquiries is that the times have changed. Hence, it is assumed that the law has changed or should change. Undoubtedly, changes and conditions

[26] 42 U.S.C. § 2792(b) (Supp. 1967).

require the application of law under different circumstances, but a constitutional government based upon a written constitution must retain its integrity or lose its classification as such. Is it to be argued that because times have changed Congress should be authorized and entitled to delegate its legislative power and authority irrespective of constitutional prohibitions? Are we now being superficial when we say that whatever the demand of the times may seem to be, the Constitution must be warped and bent out of shape to conform? Certainly not, and particularly so when it concerns one of the most vital of the supports of division of authority into the various branches of government as intended and as practiced in this country over the years since we became a republic.

The capability of this act to be interpreted and implemented to suit the exigencies of a fleeting moment is similar to the story of a shipwrecked captain who was alone in a small boat at night with an oarsman. Exhausted from his ordeal, the captain told the oarsman to keep his eye on a certain star for direction. The oarsman, also exhausted, in time likewise went to sleep, and the small boat, at the will of the waves and currents, lost direction. The oarsman awoke and then aroused the captain with this request: "Please, Captain, find me another star; we passed that one."

Although *Schechter* has not been specifically overruled, the argument has been made that it is no longer the law. If it were the law, it would be controlling and would void the Economic Opportunity Act as it applies to its legal services program. Suffice it to say that if it is not the law and the principles which it applied are no longer available for the protection of the individual against the acts of the government, which was the design and purpose of the Constitution of the United States, then it can be said that constitutional protection is gone.

STUDENT COMMENTS

SUBSURFACE STORAGE OF GAS

I. Scope

This article includes a discussion of the theories pertinent to title in injected gas and to the consequences of its ownership. Included is a detailed discussion of the right to rental payments for storage of gas as between the surface and mineral estates. Condemnation for storage purposes will not be discussed, nor will any statutes relating to gas storage.*

II. Introduction

An important problem facing the gas industry today is that of maintaining an adequate supply of natural gas at high consumption markets during periods of extremely cold weather. If distribution companies are unable to meet the demand, the closing of industrial plants may be necessitated, and the domestic supply may be curtailed.[1] The gas companies must maintain a continuous and dependable flow even during drastic temperature changes since a temporary stoppage could be hazardous to life and property. Where maximum demand is far in excess of average demand, it often is not economically feasible to construct pipelines capable of carrying peak loads. The investment required would be prohibitive, and since comparatively little gas would be moved in the summer months, the lines would operate at a low annual load factor. Under such circumstances it is apparent that storage facilities near gas markets could greatly reduce the required capacity of long trunk lines which connect producing fields with those markets.[2] Above ground storage, which is expensive, subject to fire and explosion, and often restricted by zoning, can reduce this required capacity only to a limited degree.[3]

Subsurface storage gas may be defined as gas which has been transferred from its original location to another natural underground reservoir for purposes of conservation, fuller utilization of pipeline capacities, and more effective delivery to markets.[4] The gas is injected into the ground

* For commentary on these problems see McGinnis, *Some Legal Problems in Underground Gas Storage*, 17th Oil & Gas Inst. 23, 52-84 (Sw. Legal Fdn. 1966) and Stamm, *Legal Problems in the Underground Storage of Natural Gas*, 36 Texas L. Rev. 161, 174-80 (1957).

[1] 4 W. Summers, Oil and Gas § 757.1 (perm. ed. 1962).

[2] 1 H. Williams and C. Meyers, Oil and Gas Law § 222 (1962) [hereinafter cited as Williams and Meyers].

[3] *Id.* at 326.

[4] R. Sullivan, Handbook of Oil and Gas Law 351 (1955) [hereinafter cited as Sullivan].

during periods of low consumer demand and withdrawn when needed to supplement the volume moving in the trunklines. Subsurface storage is relatively inexpensive, and it has significant safety and conservation features. Residue gas from natural gasoline plants and stripper wells, which must operate continuously to be profitable, must either be marketed, stored, or destroyed during low-demand months.[6] If there is no ready market, storage is preferable to flaring as a conservation measure, and it is also financially rewarding to the producer.

The practice of gas storage has experienced tremendous growth in recent years. In 1944 there were only 50 operating storages in the United States. These were located in 11 states with a combined ultimate capacity of 135 billion cubic feet. At the end of 1952 there were 142 storage areas located in 15 states with over a trillion cubic feet of combined ultimate capacity.[7] By early 1966 operating storages had increased to 266 in 25 states, and the combined reservoic capacity is now approximately 4.36 trillion cubic feet.[8] Depleted gas fields in the Midwest and East are the most important areas: Michigan stores 712.2 billion cubic feet, more than any other state, and Pennsylvania ranks second with 650.6 billion cubic feet.[9] At present two companies store gas in Mississippi. United Gas Pipe Line Company has a facility in Rankin and Hinds Counties, and Mississippi Valley Gas Company stores gas in Monroe County. Mississippi ranks twenty-third among the states in total capacity at 6.94 billion cubic feet.[10]

Gas cannot be successfully stored unless there is a suitable geological formation available. The formation should be sealed to such an extent that the gas does not escape. "Shallow, high permeability reservoirs that formerly produced gas and which are located near the marketing area and far removed from the source of supply are most desirable for storage."[11] High permeability is essential; it allows the gas to be injected and withdrawn at a rapid rate. Another desirable characteristic is high porosity; a highly porous formation can hold more gas.

Many economic factors affect the selection of a storage facility. An authority on the subject has suggested as most important, the following:

> Location of the formation in relation to both the pipeline and the market.
>
> Type of surface usage over the formation. The ease with which needed storage rights and the public acceptance of the proposed

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[6] WILLIAMS AND MEYERS § 222.

[7] SULLIVAN 350.

[7] *Id.* n. 51.

[8] OIL & GAS J., May 9, 1966, at 128.

[9] *Id.*

[10] *Id.* at 128.

[11] SULLIVAN 351.

project can be secured often depends upon the nature of the surface use.

Cost of obtaining storage rights. If the area is owned by numerous persons, these costs can run high.

Annual storage charges to be paid. These charges are usually greater if the area is owned by many persons.

Capacity of the area. Formations with high porosity and permeability are capable of holding more gas.

Volume and cost of cushion gas. Cushion gas is that amount of gas required to be injected in a formation in order to build up a pressure suitable to allow the balance of the injected gas to be withdrawn. Some rock structures will require a greater amount of this gas to be injected. Cushion gas under present procedures, is not recoverable.

Age of the field, if the formation is a depleted oil or gas field. Usually, the older the field, the greater the number of wells drilled therein. In the past, wells were often plugged and abandoned in a manner which would allow gas to leak from the formation. Furthermore, the exact location of many of these old wells will not be known until after injection has been commenced and the leak is noticed.[12]

The volume of gas in storage increased more than eight percent last year and has recorded an annual average increase of nine to ten percent over the last eleven years.[13] The fact that the industry has scheduled record outlays over the next four years[14] indicates that the increase will continue.

III. Title to Stored Gas

A. General

No problems arise concerning title to gas which has been injected into a natural underground reservoir so long as the gas remains beneath the land of the injector. But when it migrates to a stratum underlying the land of another, two issues have appeared which have caused litigation. First, there is the question of whether the party to whose property the gas has migrated now has ownership and the production rights. Second, when the gas has caused damage, for instance, if it has displaced valuable minerals, there is the question of whether there is liability for subsurface trespass. In each case the answer depends on whether title remains in the injector or whether title is lost when the gas is placed below the surface. In either case the result may not be satisfactory to the injector. If he retains title, he may be subject to liability for trespass,

[12] Scott, *Underground Storage of Natural Gas: A Study of Legal Problems*, 19 Okla. L. Rev. 47, 48-59 (1966).

[13] Oil & Gas J., May 9, 1966, at 128.

[14] Oil & Gas J., Aug. 8, 1966, at 34.

since he owns the offending gas; yet if he loses title, the gas which he has stored is subject to being produced by another. The cases indicate that these results necessarily follow.[15] The injector cannot retain the exclusive right to produce gas which has migrated to the property of another and yet be free from trespassory liability.

How should it be determined whether the injector retains title to stored gas? The landowner's interest in the minerals under his land has been classified on the basis of two theories: the ownership in place theory and the nonownership theory.[16] Variations of these basic theories have been delineated by some authorities,[17] but for simplicity, only these two will be considered. By the ownership theory the nature of the landowner's interest in gas and oil beneath his land is the same as his interest in solid minerals. The gas and oil are said to be owned in place. The nonownership theory holds that no person owns oil and gas until it is produced, and that any person may capture the oil and gas so long as he does not go upon the land of another to do so.[19] Theoretically, in states which subscribe to the ownership in place theory, title to stored gas would remain in an injector, and there would be trespassory liability, while in nonownership jurisdictions the opposite result would be reached. This is not true in practice, however. Although the ownership theory has significance in other areas — perhaps the most significant consequence being the classification of interests as corporeal or incorporeal[20] — title to stored gas has not been decided on this basis.[21] The deciding issue in every case has been whether or not the "rule of capture" is applicable. This rule provides that the owner of land has title to oil and gas which he produces thereon even though it is proved that part of the oil and gas was drawn from adjoining lands.[22] The rule of capture cuts across the basic theory of every state, so that oil and gas are originally subject to capture in every jurisdiction.[23] The problem of title to injected gas can be reduced to the question of whether the rule of capture applies to gas which has been once reduced to possession and later placed in an underground reservoir.

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[15] *See, e.g.*, Hammonds v. Central Ky. Natural Gas Co., 255 Ky. 685, 75 S.W.2d 204, 206 (1934): "If in fact the gas turned loose in the earth wandered into the plaintiff's land, the defendant is not liable to her for the use of her property for the company ceased to be the exclusive owner of the whole of the gas. . . ."

[16] WILLIAMS AND MEYERS § 203.

[17] *Id.*

[18] *Id.* § 203.3.

[19] *Id.* § 203.1.

[20] *Id.* § 204.2.

[21] *Id.* § 204.5.

[22] Hardwicke, *The Rule of Capture and Its Implications as Applied to Oil and Gas*, 13 TEXAS L. REV. 391, 393 (1935).

[23] WILLIAMS AND MEYERS § 204.4.

One theory is that gas returned to the earth is analogous to wild animals, animals *ferae naturae;* and that since title to a wild animal is lost when it is released, the same applies to a "wild mineral." The other view is that the animals *ferae naturae* analogy is not satisfactory, and once gas is produced, storing does not subject it to the rule of capture.

B. Title to Stored Gas Lost

Kentucky is presently the only state where the rule of capture permits production of stored gas by other than the one who stored it. The Kentucky court in *United Carbon Co. v. Campbellsville Gas Co.*,[24] indicated that the rule of capture applies to storage gas as well as to indigenous gas. The defendant, a supplier of gas to two towns, placed a suction on one of its wells in which it had previously stored gas. As a result a nearby well owned by the plaintiff stopped producing. It was not shown whether any of the gas had moved under the plaintiff's land. The court held that gas—in this case stored gas—being fugitive in nature, belongs to him who reduces it to possession, even if it causes a neighbor to lose his well.

A case of first impression in Kentucky, *Hammonds v. Central Kentucky Natural Gas Co.*,[25] applied the wild animal analogy to natural gas. The defendant company stored gas in a vacated underground reservoir which partly underlay plaintiff's property, and plaintiff brought an action in trespass for damage for the use of her land. The court stated that when gas is severed from the earth and comes into possession it becomes personal property, but that it was restored to its original wild and natural status by being placed in a reservoir, and therefore the company ceased to be the exclusive owner of the whole of the gas. Consequently the defendant could not be liable for trespass. The court developed an interesting analogy to timber:

> The gas is put back under pressure into the natural reservoirs and assumes again its original character as part of the realty.... It is analogous to the law concerning timber. Standing in the woods, timber is a part of the land. When severed it becomes personal property. If made into lumber and used to construct a building it becomes again a part of the land to which it is attached. When gas is stored in the natural reservoir it is subject to all the properties that inhered in it originally. A neighbor could take it with impunity through adjacent wells, if he owned land within the radius of the reservoir.[26]

In *Central Kentucky Natural Gas Co. v. Smallwood*,[27] the plaintiff,

[24] 230 Ky. 275, 18 S.W.2d 1110 (1924).
[25] 255 Ky. 685, 75 S.W.2d 204 (1934).
[26] *Id.* 75 S.W.2d at 206.
[27] 252 S.W.2d 866 (Ky. 1952).

who owned the surface, sought a declaratory judgment that rentals for storage were payable to the surface owner and not to the mineral interest owner. The court, in deciding against the plaintiff, held rights to injected gas to be the same as rights to gas originally in the stratum. After citing the *Hammonds* case the court said "[I]t is apparent that there is no distinction in the title to gas once recovered and released for subterranean storage and native gas before its initial recovery."[28]

In *Smallwood v. Central Kentucky Natural Gas Co.*,[29] the court refused to treat production of injected gas as sufficient to satisfy the habendum provision of a lease. It agreed with the lessor's position that *native* gas must be produced to keep the lease alive. The court, however, based its decision on an express lease provision and the intent of the parties, thereby distinguishing the *Hammonds* rule.

Again, in the recent Kentucky case of *Milby v. Louisville Gas & Electric Co.*,[30] the court by way of dictum restated its position that where injected gas moved into a space beneath another's land, it might be recovered by that person. The *Hammonds* case was again cited as controlling.

In Kentucky there seems to be no doubt that injected gas will be treated as if it were the original gas located in the ground.

A lower Pennsylvania court, in *Protz v. Peoples Natural Gas Co.*,[31] recognized the *Hammonds* rule in 1944. An injunction seeking to prevent a gas company from storing gas under the petitioner's land was denied because the evidence did not show that any of the gas had actually seeped beneath his land. The court indicated by way of dictum, however, that the argument might be accepted that when gas is released it is the property of no one, and therefore there can be no trespass. This dictum was refuted in the later Pennsylvania District Court case of *White v. New York State Natural Gas Corp.*[32]

C. Title to Storage Gas Not Lost

A federal district court of Pennsylvania, in *White v. New York State Natural Gas Corp.*,[33] held that title to natural gas which has once been reduced to possession is not lost by the injection of the gas into a storage reservoir. In this case gas which a defendant, Tennessee Gas, had injected into the Hebron pool migrated through a porous and permeable "sand neck" into the neighboring Ellisburg pool from which the defendant New York State Natural Gas Corporation was producing gas. New York State

[28] *Id.* at 867-68.
[29] 308 S.W.2d 439 (Ky. 1957).
[30] 375 S.W.2d 237 (Ky. 1964).
[31] 93 P.L.J. 239 (1944), *aff'd* 94 P.L.J. 139 (1945).
[32] 190 F. Supp. 342 (W.D. Pa. 1960).
[33] *Id.*

curtailed production when it realized it was producing gas injected by the first defendant, contending that producing this gas would amount to a wrongful taking of property. The plaintiff, who was a part owner of the proceeds from the sale of gas produced from the Ellisburg pool, sought to restrain the reduction in production, arguing that the injected gas became a "mineral *ferae naturae*." The court said it was not bound by the dictum of *Protz v. Peoples Natural Gas Co.*[34] It was admitted that Pennsylvania courts have applied the "minerals *ferae naturae*" doctrine, but the court claimed that its application has been limited to the original capture of native oil and gas. It was said that "there has been no return of storage gas to its 'natural habitat,' since Southwest gas, differing materially in chemical and physical properties from native . . . gas . . . is not native to the Hebron-Ellisburg Field."[35] The court then stated:

> Deferring to the analogy of animals *ferae naturae* under the circumstances of this case would no more divest a storage company of title to stored gas than a zookeeper in Pittsburgh of title to an escaped elephant.[36]

It is suggested on this point that the chemical dissimilarities between Southwest gas and Hebron-Ellisburg gas must certainly be much less noticeable than those of an elephant and any fauna native to Pittsburgh. The court may have overlooked an important fact when it said:

> To begin with, the storage gas in question has not escaped from its owners. On the contrary, it is yet very much in the possession of the storage companies, being within a well defined storage field, the Hebron-Ellisburg Field, and being subject to the control of the storage companies through the same wells by which the gas originally had been injected into the storage pool.[37]

It would seem that the gas did escape from Tennessee Gas Company, which had injected it. Although it may be in the possession, or under the control of the other defendant, nothing appears in the case to show that these two companies should be treated as one, nor is it explained how two distinct gas pools can be made one by merely joining their names as the Hebron-Ellisburg Field.

A factor which the court cited as important to the decision was the "public concern" in the outcome as evidenced by a state statute which was designed to promote the development of underground storage facilities.

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[34] 98 P.L.J. 239 (1944), *aff'd* 94 P.L.J. 139 (1945).

[35] White v. New York State Natural Gas Corp., 190 F. Supp. 342, 348 (W.D. Pa. 1960).

[36] *Id.*

[37] *Id.*

In 1962, a Texas decision, *Lone Star Gas Co. v. Murchison*,[38] also held that title is not lost to gas injected for storage. A portion of a reservoir extended under land on which defendant had a lease, and the defendant was actually producing gas stored by the plaintiff. The court said that gas once produced becomes personal property and is not lost by mere nonpossession. Several rather severe criticisms of the *Hammonds* analogy to wild animals were cited with approval. The analogy was called false, ugly, and fanciful, and one authority was cited which said "this *ferae naturae* doctrine has long since served its purpose."[39] A law review article was quoted in which the *White* decision was called "an eminently sound one."[40] The holding was as follows:

> [W]e are of the opinion that the rule of the Hammonds case should not be embraced as the law in Texas. An exegesis of the Hammonds opinion, when considered in the light of present day development of the gas industry, is unimpressive. The analogy of wild animals upon which Hammond is founded fails to undergird the ultimate decision of that case. Gas has no similarity to wild animals. Gas is an inanimate, diminishing, non-reproductive substance lacking any will of its own, and, instead of running wild and roaming at large as animals do, is subject to be moved solely by pressure or mechanical means.[41]

It should be noted here that although the court did not make a statement regarding the public interest in storage of gas, a passage from a law review note on the *White* case was quoted with apparent approval as follows:

> The policy arguments in favor of the court's decisions are extremely strong. It has become essential to build up a large storage reserve in the summer months to meet the heavy demands of the northern cities which are thousands of miles from the gas fields of the Southwest. Natural underground reservoirs are the only economically feasible way to store such reserves. The public's vital concern with such storage is evidenced by the fact that numerous states have passed "underground storage condemnation" statutes. In addition, at least three states have passed statutes which state explicitly that the injector of natural gas retains title to it. Thus the decision is clearly in the public's interest, in that it removes a prospective hindrance to the utilization of exhausted gas fields for storage reservoirs.[42]

One other decision,[43] a case from West Virginia, has been said to

[38] 353 S.W.2d 870 (Tex. Civ. App. 1962).
[39] *Id.* at 877.
[40] *Id.* at 878.
[41] *Id.* at 879.
[42] *Id.* at 878.
[43] Tate v. United Fuel Gas Co., 137 W. Va. 272, 71 S.E.2d 65 (1952).

be in line with the *White* and *Lone Star* decisions. A surface owner was allowed to maintain a suit against a gas injector for trespass and it has been reasoned that this means that in West Virginia ownership is not lost through injection into an underground reservoir.[44]

D. Conclusion

The rule of capture became "the law" in every state because of the inability to determine with accuracy the source of oil or gas produced by any well.[45] Although the bounds of a formation intended for gas storage are usually more precisely known than those of a newly discovered gas field, still it is practically impossible to determine with certainty the exact distance or direction injected gas may migrate. Consequently, when gas does migrate to a tract adjoining an intended storage area, it is not known how much gas underlies each area; and if in that jurisdiction the *Hammonds* doctrine is accepted with the effect that the neighboring tract has title to any gas at all, then the rule of capture should apply also. In that case title to gas from a well on the neighboring property would be in the owner of that property even though drawn from an injector's property. This points up the importance to one storing gas of obtaining sufficient property rights. Many states do have statutes providing for condemnation of storage facilities, but as pointed out, there is no way to know positively the formation boundaries. As an example, there was the previously unknown "sand neck" connecting two gas fields in the *White* case which allowed gas to move out of one field and into another. In such instances it will be of the utmost importance which doctrine the concerned jurisdiction adopts.

The wild animal doctrine has been much criticized and the analogy was admitted to be somewhat fanciful by the Kentucky court which subscribes to it.[46] However, the rule of capture, a fixture everywhere, is an outgrowth of the doctrine. Although in *White* the court stated that possession was not lost because the gas had not escaped from the owners, it seems that when gas migrates from the position in which it is expected to remain, it has escaped. It is also suggested that the chemical dissimilarities of Southwest gas and Pennsylvania gas which the court pointed out to refute the contention that the gas had returned to its native habitat, are not pertinent. On the other hand, it is well known that oil and gas do not roam at large like wild animals, and that they are moved only by pressure or mechanical means. The American rule is that when personal property is annexed to real property, the question of whether

[44] 63 W. Va. L. Rev. 383 (1961).

[45] Hardwicke, *The Rule of Capture and Its Implications as Applied to Oil and Gas*, 13 Texas L. Rev. 391, 397 (1935).

[46] Hammonds v. Central Ky. Natural Gas Co., 255 Ky. 685, 75 S.W.2d 204, 205 (1934).

the personal property is converted to real property depends upon the intention of the person making the annexation.[47] Thus the contention that gas once reduced to possession remains personal property although it is later injected into the ground seems justified.

Public policy, in this case the interest of the public in not hindering the growth of a vital industry, is mentioned in both the *White* and *Lone Star* cases, and indeed in both cases it may well have been the deciding factor. Perhaps the invasion of space beneath the earth should be privileged as it is above the earth for air travel, in which instance the landowner is allowed to recover only for actual damage.

Mississippi is regarded by all the authorities as an ownership-in-place state.[48] However, the ownership theory has not been decisive in other states, and this state's position remains open to question.

An eminent authority suggests that a negative rule of capture seems to be developing by which gas can be injected into a formation even though it may migrate to the land of another and there displace more valuable substances; for instance, the replacement of "wet" gas with "dry" gas. It is suggested that this "negative rule" should be applied only when it is pursued as part of a reasonable program of development and when it can be applied without injury to producing or potentially producing formations.[49]

A degree of certainty could be attained in Mississippi by statutory enactment. It might be desirable to have a statute adopting the "negative rule of capture." This statute could provide that gas could be stored beneath another landowner's property without liability to the injector who acts reasonably, and at the same time it could reserve title to the gas in the injector. Great care must be taken in the construction of such a statute since in at least one state a statute has created more problems than it solved.[50]

IV. Ownership of Storage Rights as Between Surface and Mineral Estates

A. General

After a suitable structure has been found for gas storage purposes, the legal problem arises: From whom should the gas storage rights be purchased? The fact that in some jurisdictions title to gas is lost upon injection makes it imperative that the storer have the exclusive use of the stratum and also the exclusive right to inject and remove the gas.

[47] W. Burby, Real Property § 11 (3d ed. 1965).

[48] Williams and Meyers, § 203.

[49] *Id.* § 204.5.

[50] Stamm, *Legal Problems in the Underground Storage of Natural Gas*, 36 Texas L. Rev. 161, 177 (1957).

This is also true in the other jurisdictions because of the danger of subsurface trespass or confusion of goods. Certain rights on at least a portion of the surface overlying the stratum will also be needed by the storage company. Some of these surface rights needed are:[51] (1) the right to drill injection and withdrawal wells; (2) the right to build equipment and compressor stations; (3) the right to construct pipelines to carry the gas to and from the reservoir.

There are three methods by which storage rights may be acquired: deed, lease, or condemnation. Since condemnation is purely a statutory means, this paper will not cover this method of acquisition. The simplest method is to acquire by deed all the interests in the surface and subsurface estates. This, however, is inappropriate in most circumstances because of the vast acreage overlying a reservoir and the great expense involved. The most common form of acquisition is by a combination "Oil and Gas and Gas Storage Lease."[52]

B. Fee Owner

When the fee ownership of the land, both surface and mineral, containing the reservoir is in one or more persons, there does not exist a problem in determining the owner of the storage rights. By obtaining the exclusive right of drilling from the fee owner, anyone else will be precluded from drilling into the reservoir and capturing gas therefrom.[53] Likewise, if the exclusive right of drilling is obtained, there is no danger of subsurface trespass or confusion of goods.[54]

In the event the land is owned by numerous fee owners, a serious problem may arise for the storage company. In this situation if any one of the fee owners refuses to give his consent to the storage project, the storage company may have to select another reservoir for their storage purposes. Also, where there are numerous fee owners, the expense of acquiring the storage rights might be excessive, especially if some are reluctant to give their consent to the storage of gas.

C. Severance of Mineral Estate

The real problem of determining who should be compensated for the use of a storage reservoir occurs where there has been a severance of the surface and mineral estate. The severance can come about by either a mineral deed, a mineral deed and a subsequent oil and gas lease, or by an oil and gas lease alone.

There have not been many reported cases which have dealt directly

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[51] *Id.* at 164.

[52] *Id.*

[53] Scott, *Underground Storage of Natural Gas: A Study of Legal Problems*, 19 OKLA. L. REV. 47, 56-57 (1966).

[54] *Id.*

with the problem of determining which of the interest owners, surface or mineral, should be compensated for the use of a stratum for storage purposes. In *Central Kentucky Natural Gas Co. v. Smallwood*[55] the plaintiff owned all of the surface estate and one-half of the mineral estate upon which the defendant gas company held a combination oil and gas lease and storage agreement. No oil or gas was produced from wells located on the property in question. The only use to which the defendant put the property was for gas storage purposes. The defendant paid one-half of the storage rental to the plaintiff and the other half to the other mineral owner. The defendant did not utilize any of the surface for its storage purposes. The plaintiff brought suit seeking a declaratory judgment that he, as surface owner, was entitled to the entire storage payments. The lower court found that the surface owner was the one entitled to compensation for the use of stratum for storage purposes. The Court of Appeals of Kentucky reversed the decision of the lower court, holding that as between a surface and mineral estate owner the mineral owner was entitled to the rentals due under a gas production and storage lease. The court based its decision upon *Hammonds v. Central Kentucky Natural Gas Co.*[56] As noted previously, the court in the *Hammonds* case found that re-injected gas was analogous to *ferae naturae,* and title was thus lost when the gas was re-injected into the ground. Therefore, the court in the *Smallwood* case[57] concluded that since there was no distinction in ownership between native gas and stored gas and since the mineral owner has the exclusive right to explore for and produce gas, the mineral owner would be the only one capable of leasing the right to explore or produce gas, native or stored. The court further stated:

> [I]n the case of fugitive minerals, the mineral owner does not own a specific cubic foot of water, oil or gas under the earth until he reduces it to possession. The reason is, these substances may be under his land today and somewhere else tomorrow. His ownership involves merely the right to explore and reduce the minerals to possession. Therefore, the geological formations or strata common to this class of minerals may be exhausted a thousand times and the mineral owner still retain the exclusive right to take all the minerals which find their way into the formation, whether through injection or in any other way.[58]

Thus, to protect its interest in the injected gas the storage company had to purchase the exclusive right to produce and explore for the gas it had released under the surface. The court also went one step further and

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[55] 252 S.W.2d 866 (Ky. 1952).
[56] 255 Ky. 685, 75 S.W.2d 204 (1934).
[57] 252 S.W.2d 866 (Ky. 1952).
[58] *Id.* at 868.

indicated that the storage company could use a reasonable and necessary amount of the surface without compensating the surface owner therefor.

In *Tate v. United Fuel Gas Co.*[59] a completely opposite result was reached in that the surface owner was found to be entitled to the rental payments for the storage of gas. Here, the plaintiff sued to enjoin the defendant from use of the strata beneath his land for gas storage purposes, for cancellation of the gas storage agreement as a cloud upon his title, and for the value of the previous use of the land for unauthorized purposes. The original fee owner had conveyed the land to the plaintiff's predecessor in title, excepting from the conveyance oil, gas, and other minerals together with the exclusive right to drill, produce, and remove the oil, gas, and other minerals thereby excepted. It was provided in the exception, however, that the term "minerals" did not include sand, clay, or stone, except that necessary for the production of the oil, gas, and other minerals excepted. The land was subsequently conveyed to the plaintiff with the same reservations. The mineral owners then executed an oil and gas lease to the defendant which superseded a previous oil and gas lease, and also executed a gas storage agreement to the defendant with the right to lay pipelines and drill storage wells upon the surface estate. The prior lessee had drilled a producing gas well upon the tract, but the well had since ceased to produce in paying quantities. The defendant completed a gas well in the formation for the purpose of storing gas. No gas was ever produced out of that well, but gas from elsewhere was transported and stored in the formation.

The plaintiff contended that he owned all of the clay, sand, and stone within and beneath his land, and further that the defendant had caused damage to the surface by laying pipelines and by its drilling and storage operations. On the other hand, the defendants contended that since certain space was vacated by the production of gas from the formation, the defendants owned such space and had the exclusive use thereof.

The court, in upholding the plaintiff's contentions and granting him equitable relief, based its conclusion mainly on the fact that clay, sand, and stone were specifically excluded from the exception in the deed, and therefore, the stratum was owned by the plaintiff. The court rejected the defendants' contention on the basis that there were no recoverable minerals in the stratum; therefore, under these facts the solid mineral cases cited would not give the defendants the right to the use of the space in the stratum. It should be noted that, even though it does appear the court relied mainly upon the exclusion of the clay, sand, and stone from the exception in the deed, the court also went on to state:

> [I]t is a fair assumption that the exception . . . in the deed . . . was for the purpose of mining and operating the land for the

[59] 137 W. Va. 272, 71 S.E.2d 65 (1952).

> production of minerals. Now, defendants are seeking to utilize their ownership rights and privileges provided for in that exception for a different purpose, *i.e.*, the storage of gas produced elsewhere.[60]

It seems that since the *Smallwood* case was based on the *Hammonds* decision and the *Tate* case was based upon the exclusion of clay, sand, and stone from the mineral deed, the *Smallwood* and *Tate* cases do not materially shed any light on the problem of who should be compensated for the use of stratum for gas storage purposes.

There has been a wide range of disagreement among the writers who have tackled this problem. An approach taken by one writer, which seems to have substantial merit, is that the surface owner should be compensated for the use of the stratum for storage purposes since this appears to be the intention of the parties when a mineral deed or lease is executed.[61] If there are any recoverable minerals left in the reservoir, the mineral owner would have to be compensated therefor.[62] A typical mineral deed states:

> [G]rant, sell, convey, assign and deliver unto the said Grantee, an undivided _____ interest in and to all of the oil, gas and other minerals in and under, and that may be produced from the following described land . . . for the purpose of mining, drilling and exploring said land for oil, gas and other minerals, and removing the same therefrom.[63]

The writer, in arriving at the conclusion that it is the intention of the parties that the surface owner should be compensated for use of the stratum for storage, stated:

> The use of the words "produced from" and "removing" would seem to indicate an intent to grant extraction rights as opposed to occupation rights. Therefore, the language of the instrument makes it highly doubtful that storage was intended. Furthermore, this result is fortified by the fact that no words in the instrument can really be said to make any affirmative grant of occupation rights. None of the words *mine, drill,* nor *explore* implies occupancy unrelated to production and extraction of minerals.[64]

This construction of the type mineral deed set forth above can also be fortified by the principle of construction that any secret, subjective, or

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[60] *Id.*, 71 S.E.2d at 72.

[61] McGinnis, *Some Legal Problems in Underground Gas Storage,* 17TH OIL & GAS INST. 23, 47 (Sw. Legal. Fdn. 1966).

[62] *Id.*

[63] OAKES, STANDARD OIL AND GAS FORMS 205 (1952).

[64] McGinnis, *Some Legal Problems in Underground Gas Storage,* 17TH OIL & GAS INST. 23, 48 (Sw. Legal Fdn. 1966).

unexpressed intention or purpose will not be considered in the construction of deeds.[65] This is also in accord with the primary principle of construction that the real intention of the parties, especially that of the grantor, should be determined and given effect whenever possible.[66]

Another theory advanced in favor of the surface owner being entitled to the compensation for storage projects is that the term "minerals" should not be construed to include the geological stratum in which the minerals are contained.[67] This theory is based upon the assumption that "the term 'surface' refers to the matrix of the earth, from its core to its crust," and that when there is a severance of the minerals, the ownership of the valuable minerals contained within this area is the only thing severed from the surface estate.[68] It would appear, however, that this theory would be in direct conflict with the general rule that the term "minerals" includes all mineral substances which can be taken from the land, and that, in order for the term to be limited in its scope, there must be qualifying words indicating that the parties intended a less general meaning.[69] On the other hand, in the jurisdictions which limit the term "minerals" to materials which possess exceptional qualities or value,[70] it is conceivable that the courts would not include the geological stratum which contains the minerals within the term "minerals."

Contrary to the view that the surface owner should be the person compensated is the view that only the mineral owner should be compensated. There are two different approaches taken in arriving at this conclusion. One theory is that a "mineral severance should be construed as granting exclusive rights to subterranean strata for all purposes relating to minerals, whether 'native' or 'injected,' absent contrary language in the instrument severing such minerals."[71] In conjunction with this theory, however, is the contention that this does not include the implication of a surface easement in connection with injection or production of artificially injected gas as is implied in the case of the exploration and production of native minerals.[72] If storage can be construed to relate to minerals in such a manner as to bring it within a mineral deed not expressly providing for such use, the necessary and reasonable use

[65] Greenshields v. Superior Oil Co., 204 Okla. 681, 233 P.2d 959, 962 (1951); *see* 23 AM. JUR. 2d *Deeds* § 161 (1965).

[66] Singer v. Tatum, 251 Miss. 661 ,686, 171 So. 2d 134, 145 (1965); *see* 23 AM. JUR. 2d *Deeds* § 159 (1965).

[67] Scott, *Underground Storage of Natural Gas: A Study of Legal Problems,* 19 OKLA. L. REV. 47, 60 (1966).

[68] *Id.*

[69] Tate v. United Fuel Gas Co., 137 W. Va. 272, 71 S.E.2d 65, 71 (1952). *See generally* Annot., 95 A.L.R.2d 846 (1964).

[70] *See,* e.g., Hendler v. Lehigh Valley R. Co., 209 Pa. 256, 58 Atl. 486 (1904). *See generally* Annot., 95 A.L.R.2d 849 (1964).

[71] WILLIAMS AND MEYERS § 222.

[72] *Id.* at 332.

of the surface in regard to storage operations should also be implied since this use also relates to minerals. At least two writers in the field agree with this conclusion.[73] The second view is that a stratum which is considered to be depleted of recoverable reserves may nevertheless be rendered valuable by subsequent development in the field of secondary recovery or, because of the fugacious character of oil and gas, it may be rendered valuable again by the migration of oil or gas into the stratum.[74] Because of the fugacious character of oil and gas and the consequent uncertainty as to whether oil or gas might migrate into the formation, the mineral owner who retains the exclusive right to drill and explore should be the one from whom storage rights should be acquired.

Another line of thought which has come forth is the application of the solid mineral cases by way of analogy in determining the ownership of underground spaces vacated by minerals.[75] The English rule in this regard is that the mineral owner is entitled to the use of the space even after all of the minerals have been removed.[76] The American courts, however, with the exception of a few have been reluctant to adopt the English rule and have held that the space left by the removal of minerals reverts to the surface owner by operation of law after all the mineral has been taken therefrom.[77] Therefore, it has been contended that the surface owner alone is entitled to the compensation for the use of stratum for storage purposes. Under this view of solid minerals, the American courts have construed the conveyance of solid minerals to include only the minerals and not the geological stratum which contains the minerals, unless a contrary intention is set forth in the instrument.

In Mississippi there are no cases directly in point. It can be argued, however, that the case of *Westbrook v. Ball*[78] stands for the proposition that the mineral owner should be compensated for storage operations. Suit was brought by the plaintiff for construction of the mineral reservation contained in the deed from the defendant. The defendant had reserved unto himself "all of the oil, gas, and other minerals . . . as may be mined and produced from said land, together with rights to go upon, enter, to explore for, drill for, mine, store, transport, and remove all of said minerals. . . ."[79] In determining that the defendant was the owner

[73] *See* Stamm, *Legal Problems in the Underground Storage of Natural Gas,* 36 TEXAS L. REV. 161, 172 (1957); McGinnis, *Some Legal Problems in Underground Gas Storage,* 17TH OIL & GAS INST. 23, 50 (Sw. Legal Fdn. 1966).

[74] Stamm, *Legal Problems in the Underground Storage of Natural Gas,* 36 TEXAS L. REV. 161, 172 (1957).

[75] *Id.* at 168.

[76] Bowser v. Maclean, 45 Eng. Rep. 682 (Chan. 1860).

[77] *See, e.g.,* Attebery v. Blair, 244 Ill. 363, 91 N.E. 475 (1910).

[78] 222 Miss. 788, 77 So. 2d 274 (1955).

[79] *Id.* at 789-90, 77 So. 2d at 275.

of the minerals the court stated that the right to enter, explore, drill, mine, *store*, and remove the minerals is implied, if not expressly reserved, where minerals are reserved. It would appear, since the court treated the right to "store" just like the right to drill or explore as being incident to the ownership of minerals, that the mineral owner in Mississippi would be entitled to the compensation for the storage of gas. The court cited *McNeese v. Renner*[80] as authority for the rule that these rights, including storage, would be implied. It should be pointed out, however, that the court in *McNeese* did not include storage as one of the rights that would be implied in a mineral deed or reservation as incidental to the ownership of the minerals.[81] It should also be noted that the word "store" was included in the reservation in the deed.

D. Practical Application in Mississippi

In looking at how the problem has been dealt with in Mississippi it would be helpful to look at the lease forms used. As previously mentioned, Mississippi Valley Gas Company and United Gas Pipe Line Company are the only companies which presently store gas in Mississippi. It should be pointed out first of all that both companies recognize the interests of both the mineral owner and the surface owner in their lease forms. One type of gas storage agreement used in Mississippi provides for payment of an annual rental to the grantor for the right to "introduce or inject natural gas or any other gases or vapors" into the geological stratum or formation named in the agreement and retention of the possession and ownership of the injected gas as personal property. In addition to the annual rental for the storage right, the lease further provides for the annual payment of a fixed amount for each storage or production well drilled upon the land. The lease is to run for ten years and "as long thereafter as gas is being stored, held in storage or produced or withdrawn," even though the gas is being stored or produced through wells located on other property. The lease contains an "unless" clause and also a provision for the payment of rentals in the secondary term. In the event there is an oil and gas lease presently outstanding, the lease provides that the storage company's rights will be effective only to the extent that they do not conflict with the provisions of the oil and gas lease. Since the storage company is only leasing the rights to a specified geological stratum, the rights of the storage company against damage to the reservoir are protected by a provision requiring the grantors to use all reasonable efforts to prevent damage to the reservoir by their drilling of a well on the land. The provision further states that the grantors will not complete, nor allow to be completed, a well in the storage reservoir.

[80] 197 Miss. 203, 21 So. 2d 7 (1945).

[81] *Id.* at 217, 21 So. 2d at 8.

V. Conclusion

Since the only two cases which deal directly with the question of whether the surface or mineral owner should be compensated for the use of stratum for storage have reached different conclusions, confusion still remains as to how the courts in other jurisdictions will decide the question. This does not leave the gas companies in a very safe position considering that there is also the problem of whether title to injected gas will be lost upon injection as set forth in the *Hammonds* case.[82] Therefore, the gas companies have had to recognize the interests of both the surface owner and the mineral owner in leasing the necessary land for the storage project.

There have been several theories advanced by authorities in the field of oil and gas law, any one of which a court could conceivably adopt as the rule of that state. Thus, there does not seem to be an easy solution to the problem. In Mississippi the case of *Westbrook v. Ball*[83] could possibly indicate the direction in which our courts might turn in answer to the problem. It does not seem likely, however, that the problem will come before our courts as long as the gas companies continue to recognize both interests in the acquisition of storage rights.

There is, however, a manner in which the problem of who owns the storage rights can be solved in the future. There can be no doubt as to who owns the storage rights if there is a provision in the mineral deed or oil and gas lease which expressly vests the storage rights either in the surface owner or the mineral owner.

Wade H. Creekmore, Jr.

William B. Harvey

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[82] 255 Ky. 685. 75 S.W.2d 204 (1934).

[83] 222 Miss. 788, 77 So. 2d 274 (1955).

QUERY: WHAT IS THE THEORY OF ERIE?

Nineteen thirty-eight saw the occurrence of two important events. One, *Erie Railroad Company* v. *Tompkins* was handed down making it mandatory that federal courts follow state judge-made law in diversity cases;[1] and two, the Federal Rules of Civil Procedure were approved.[2] These two circumstances were not necessarily in conflict. *Erie* commanded only that state "substantive" law be followed so that the ultimate determination of the merits would not be substantially different from that of a state court of the same state. Since the Rules merely promulgate a method of procedure, they are adjective in nature, and not contrary to *Erie*. The problem is one of determining what is "substantive" and what is "procedural."[3]

Perhaps the best approach is to begin with the statute that wrought so much of the confusion now being borne by the American judiciary. Section 34 of the Judiciary Act of 1789 provided:

> [T]he laws of the several States, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.[4]

This statutory provision has probably caused more confusion among the legal profession than any other single expression.[5] The purpose of this comment is to discuss one ramification of problems arising from this statute. That problem concerns rules respecting the admission of evidence in federal diversity suits, with little or no mention given to either federal question cases, or evidentiary problems in criminal practice. A mere mention will be given to situations involving traditional conflict of laws dilemmas.[6]

Of significant import in such a discussion is the distinction between "substance" and "procedure." Generally, it may be said that evidence will be admissible in a diverstiy suit in federal court, whether or not it would have been allowed in the state proceeding, if the matter is proce-

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[1] 304 U.S. 64 (1938).

[2] Order of Dec. 20, 1937, 302 U.S. 783.

[3] See Tunks, *Categorization and Federalism: "Substance" and "Procedure" After Erie Railroad v. Tompkins*, 34 ILL. L. REV. 271 (1939).

[4] 1 Stat. 92 (1789), REV. STAT. § 722 (1875) (now 28 U.S.C. § 1652 (1964)).

[5] See Quigley, *Congressional Repair of the Erie Derailment*, 60 MICH. L. REV. 1031 (1962).

[6] For excellent discussions of the conflicts problems see generally STUMBERG, CONFLICTS 140-71 (1963); GOODRICH, CONFLICTS 142-64 (4th ed. 1964); EHRENZWEIG, CONFLICTS 354-58 (1962).

dural.[7] However, the use of such a dichotomy may be misleading in light of recent interpretations given the Judiciary Act of 1789.[8]

Perhaps the best way to understand the federal diversity evidentiary problem is to look at the case law development respecting the Judiciary Act of 1789.[9] The landmark decision of *Swift v. Tyson*,[10] which was the governing authority interpreting the Judiciary Act for ninety-six years, held a federal court in a diversity suit was not compelled to adhere to the unwritten law of a state in determining if "a pre-existing debt constitutes a valuable consideration in the sense of a general rule applicable to negotiable instruments."[11] Justice Story, writing the opinion in *Swift*, chose to regard court decisions not as laws, but only as evidence of laws which need not be followed. In urging uniformity Justice Story, along with a majority of the Court, distinguished local matters involving such things as real estate transactions from general commercial transactions. With respect to matters which were general, Justice Story decided that local state law would not govern, but instead, general federal common law would control. While this view was, for the most part, adhered to, it did not completely escape criticism during its ninety-six year existence.[12] However, it was not until 1893 that an attack was leveled against *Swift* forecasting its ultimate eradication[13] which finally came forty-five years later in *Erie Railroad Company v. Tompkins*.[14]

April 25, 1938, saw the demise of *Swift* and of the Judiciary Act of 1789 as it had been previously understood. Disregarding a multitude of precedent, Justice Brandeis overturned the *Swift* doctrine with his opinion in *Erie Railroad Company v. Tompkins*. The suit was one of diversity involving the jurisdictions of Pennsylvania and New York. Plaintiff brought suit in the Southern District of New York, charging defendant railroad with negligence, and relying on *Swift*. The defendant railroad contended that under Pennsylvania law it was not liable. The district court held for the plaintiff, and the judgment was affirmed by the Court of Appeals on the ground that the issue was one of general law not determinable by local Pennsylvania court rulings. Further, since there were no local statutes on point, the federal court was free to exercise its own independent judgment. The Supreme Court, holding that case law as well as statutory law was to govern in federal diversity suits, reversed and apparently disposed of the distinction between local and general law. Not only was *Swift* overruled, an action not requested by

[7] See Monarch Ins. Co. v. Spach, 281 F.2d 401 (5th Cir. 1960).

[8] 1 Stat. 92 (1789), REV. STAT. § 722 (1875). (now 28 U.S.C. § 1652 (1964)).

[9] *Ibid.*

[10] 41 U.S. (16 Pet.) 1 (1842).

[11] *Id.* at 16.

[12] See Baltimore & Ohio R.R. Co. v. Baugh, 149 U.S. 368, 391 (1893) (dissenting opinion).

[13] *Id.* at 403.

[14] 304 U.S. 64 (1938).

defendants, but the Court went so far as to say "We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the *Constitution* to the several states."[15] (Emphasis added.)

While *Erie* was a sweeping decision, its full impact was yet to be realized. Since the Judiciary Act of 1789 plainly referred to "decisions in trials at common law"[16] as rules to be followed by the federal judiciary, it was yet unknown what effect *Erie* would have on federal diversity proceedings in equity. That point was soon resolved in *Guaranty Trust Company v. York*.[17] The suit was in equity and revolved around whether the federal court must preclude an action barred by a state statute of limitations. The Court might have resolved the issue either by holding that a state statute of limitations was procedural and need not be adhered to under *Erie* which was limited to "substantive" state law, or by holding that *Erie* was limited to matter at law and did not extend to actions in equity. However, Justice Frankfurter chose to follow neither of these avenues of thought in his opinion. Instead, he elected to view both legal and equitable actions as includable under *Erie*. Whether or not a state statute of limitations need be followed by a federal court in a diversity case is dependent on whether ignoring such a law would substantially alter the outcome of the case. This, Justice Frankfurter and the majority of the Court believed, should be the rule. Since the federal court in diversity matters is

> [I]n effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State.[18]

The opinion seemed to be based on two grounds: (1) the final outcome of a suit should not be materially changed by so fortuitous a circumstance as diversity; and (2) to follow a rule different from that in a state court would lead to forum shopping if such a difference would alter the final outcome of the litigation.

Despite the fact that Mr. Justice Frankfurter's "outcome-determinative" test has received much criticism, it is submitted that such a test is sound and, theoretically in line with *Erie*. One justification for overruling *Swift* was that uniformity had not been attained under the Judiciary Act of 1789, and that *Erie* would lead to a degree of uniformity among the courts sitting in *one* state.[19] However, it may be argued that

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[15] *Id.* at 80.

[16] 1 Stat. 92 (1789), Rev. Stat. § 722 (1875) (now 28 U.S.C. § 1652 (1964)).

[17] 326 U.S. 99 (1945).

[18] *Id.* at 108-09.

[19] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 74-78 (1938).

Guaranty Trust will foster forum shopping and a lack of uniformity among the various circuits. While this criticism has some merit, it seems of minor importance. Upon considering the two types of forum shopping—(1) between the courts of the state and the federal courts sitting in the same state, and (2) among the various federal courts sitting in different states—the latter seems less dangerous and less likely to occur, primarily because it is limited by the burdens of additional expense. A further criticism of the "outcome-determinative" test is that such a standard is too inflexible and will tend to nullify the Federal Rules of Civil Procedure.[20] This fear, however, was proven unwarranted in *Byrd v. Blue Ridge Rural Elec. Co-operative*[21] when the Court stressed the importance of permitting litigants in federal courts to resolve issues on the merits under "substantive" state law, while at the same time allowing federal courts the authority to administer themselves apart from state rules.

In the *Byrd* case[22] the plaintiff brought an action in negligence. The defendant countered that plaintiff was an employee of defendant and that an action under the workmen's compensation statute was the sole remedy in the state courts of South Carolina. The courts of that state had held that such a defense was to be determined by a judge and not a jury.[23] The Supreme Court decided that the lower federal court was not bound to follow the state case law. The Court seemed to hold that this was merely a matter of procedure, and not within the guidelines established by *Erie-Guaranty Trust*. Second, even if this were a matter of substantive law, it was not apparent that the outcome would be substantially different where a judge rather than a jury decided the issue in question. Finally, and probably more significant than the two preceding rationales, was the expression of adherence to federal policy, even where state case law is contrary. In holding that there is ". . . a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts"[24] and relying on the seventh amendment guaranty of jury trials in actions at law, the Court felt bound to disregard the conflict case law of South Carolina. It is submitted, contrary to the opinion of most writers in the area,[25] that *Byrd* was wrongly decided. First, it should be of no concern whether an issue is "substantive" or "procedural" if the outcome will be materially altered by following a contrary federal rule or policy. Second, a federal court

[20] See Hart, *The Relations between State and Federal Law*, 54 COLUM. L. REV. 489 (1954).

[21] See 356 U.S. 525 (1958).

[22] *Ibid.*

[23] Adams v. Davison-Paxon Co., 230 S.C. 532, 96 S.E.2d 566 (1957).

[24] 356 U.S. 525, 538 (1958).

[25] See, *e.g.*, Comment, *The Constitutional Power of Congress to Control Procedure in the Federal Courts*, 56 NW. U.L. REV. 560 (1961).

sitting in a diversity case should be required to follow state cases, whether or not it can be conclusively shown that the outcome will be substantially different, if it appears "reasonable" that such will be the result. The use of federal policy as a factor to be balanced against state case law is nothing more than a regression to the outmoded view of *Swift*. Finally, the argument that the seventh amendment demanded allowing a trial by jury seems unwarranted in light of the fact that the question was earlier reserved to the states by the tenth amendment through *Erie*. This decision might well lead to forum shopping between state and federal courts within the same state, a condition which *Erie* sought to eliminate. Some writers appear to ignore this possibility when taking the so-called "liberal" approach to federal court activity.[26] It has been argued that federal courts in diversity matters may apply "general law" under *Erie*.[27] The three justifications seem to be: (1) inherent in the duty to hear diversity cases under article III, section 2 of the Constitution, is the right to formulate the rules of conduct to be applied in that tribunal; (2) the federal judiciary may operate as it deems best under article I, section 8, familiarly known as the "necessary and proper" clause; and (3) Congress may tell the federal courts which subjects they may decide for themselves and which must be decided according to state law."[28]

While the guidelines established by *Erie* are far from clear in simple diversity cases, they are even more vague in conflict of laws situations. One of the first definitive cases on diversity in conflict of laws situations was *Sampson v. Channell*.[29] The issue was one of negligence arising out of an automobile accident in Maine. Suit was brought in federal court in Massachusetts on the basis of diversity. Of primary concern was the question of burden of proof respecting contributory negligence. According to Massachusetts law, the burden of proof was on the defendant, while in Maine the burden was on the plaintiff. As a general conflicts rule, the law of the place where the tort was allegedly committed governed.[30] However, if the courts of the state where the action was brought viewed such law as procedural, the foreign law would be ignored and forum law would be followed.[31] Massachusetts viewed burden of proof as procedural, and applied its own rules in state cases.[32] Despite this, the federal court followed Maine law. On appeal the Second Circuit

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[26] See, *e.g.*, Clark, *Federal Procedural Reform and States' Rights; to a More Perfect Union*, 40 TEXAS L. REV. 211 (1961).

[27] See Friendly, *The Gap in Lawmaking — Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787 (1963).

[28] WRIGHT, FEDERAL COURTS § 56, at 198 (1963).

[29] 110 F.2d 754 (1st Cir.), *cert. denied*, 310 U.S. 650 (1940).

[30] See, *e.g.*, Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918).

[31] See, *e.g.*, Nowell v. Waterman, 53 R.I. 16, 163 Atl. 402 (1932).

[32] Hoadley v. Northern Transp. Co., 115 Mass. 304, 15 Am. Rep. 106 (1874).

reversed with Judge Magruder stating that *Erie* required the following of the local law of Massachusetts. This seems justified, in that had suit been instituted in the Massachusetts state court, Massachusetts law would have controlled. The interesting point here is that the federal court was required to follow a state rule classed as "procedural" where there was another state "substantive" law in conflict, namely the law of Maine. This is important as evidencing that a mere "substantive-procedural" differentiation is not controlling, but rather, the controlling test is whether the "outcome" will be different in the federal and state courts of the same state. Again, an important factor in the decision might well have been the desire of the courts to retard forum shopping.

A year later the Supreme Court took a second look at the problem posed by conflict of laws situations in *Klaxon Company v. Stentor Electric Manufacturing Company.*[33] The action was one for breach of contract in which the plaintiff asserted that the defendant had failed to emphasize the manufacture and sale of particular patented articles. Although the agreement was executed in New York and was to be performed there, suit was instituted in Delaware. The issue involved whether or not plaintiff was entitled to interest on damages. Under New York law the plaintiff was entitled to interest, but under Delaware law he was not. The federal district court chose to treat the measure of damages and the question of interest as "substantive" and applied the New York rule. The Supreme Court, however, said that Delaware's local law controlled because it governed under Delaware conflict of laws cases. This appears to be the first case directly holding that in a diversity suit in federal court, not only must the law of the state in which the court is sitting be applied, but the conflict of laws rule must also be followed.

While *Klaxon* may pose some logical inconsistencies and create some theoretical gaps, it appears to be in line with *Erie*, and particularly with *Guaranty Trust*. The Court correctly decided *Klaxon* in light of its intent to discourage forum shopping, however complicated *post-Erie* jurisprudence may have become.

One problem that will surely arise is that concerning *renvoi*. *Renvoi* is commonly defined as "reference back," and can best be explained through example.[34] Suppose that while driving his automobile through Alabama, a Mississippian negligently collides with a pedestrian. Suit is brought in the state court of Mississippi, and the defense of contributory negligence is raised. Alabama has a statute precluding recovery for negligence where contributory negligence is proven, but Mississippi is governed by a comparative negligence statute. Further, assume that the courts of Mississippi have held that when looking to a foreign law, it

[33] 313 U.S. 487 (1941).

[34] For a short illustration of *renvoi* see STUMBERG, CONFLICTS 11 (1963).

must look not only to the forum law, but also to the conflict laws of the foreign jurisdiction. Suppose even further that Alabama has a similar rule of looking both to the local and conflict laws of a foreign jurisdiction when suits are brought in Alabama. In addition, assume that Alabama has recently decided its contributory negligence law will be operative only if all litigants are from jurisdictions with like statutes, but will not be controlling if one or more of the litigants resides in a jurisdiction having a comparative negligence statute. Which defense is to be applied? The first determination to be made by the Mississippi court is whether such a defense is "substantive" or "procedural." If "procedural," the matter is at an end, and comparative negligence will be the defense, based on the concept that the *lex fori* is inherently operative so that courts may administer their own proceedings. However, if the defense is categorized as "substantive," Mississippi will be forced to look to the whole law of Alabama, including its conflicts laws. Here it will be seen that Alabama has a contributory negligence law, and if suit were brought there, Mississippi law would be applicable. This does not necessarily mean that the comparative negligence statute would govern, for it must be remembered that Alabama, like Mississippi, would look to the whole law of Mississippi. By referring to Mississippi, the entire cycle is begun anew. Briefly, this is *renvoi.* Generally, the law to which the court first refers controls, in this example Mississippi's comparative negligence statute. Suppose, as an additional facet of this hypothetical, the suit were removed by the defendant to federal court in Mississippi on the basis of diversity of citizenship.[35] First, following a strict construction of *Erie* and *Guaranty Trust,* the federal court might follow the exact steps taken by the Mississippi court. Second, it might view Mississippi's comparative negligence statute as "procedural" and not binding, while at the same time view the Alabama law as "substantive," thus controlling. Third, there might be a federal statute which the court would be obligated to follow. Finally, the federal court might view the entire matter as "procedural" and adopt a rule from any of fifty jurisdictions. Merely to say that "procedural" is the process of getting into court and placing the issues before the court so they can be decided, while "substance" is the actual decision-making process, begs the question and is, at most, simplistic. Of primary concern still seems to be the problem of differentiating between the two.

It has been said that what will be classed as "procedural" in one situation, may be "substantive" in another.[36] An important factor may be whether the court is making the distinction for the purpose of (1) determining its rule-making power, (2) resolving conflict of laws problems,

[35] For a factual situation of even greater complexity see Van Dusen v. Barrack, 376 U.S. 612 (1964).

[36] WRIGHT, FEDERAL COURTS § 59, at 207 (1963).

or (3) determining whether to apply state or federal law.[37] In attempting to differentiate between the two, the purpose for which the distinction is being made will be of much significance.

The "substance-procedure" dichotomy is an important factor in determining which law to apply, but it is not the only one. Some other factors to which the courts look in order to decide whether the matter in question falls within the ambit of *Erie-Guaranty Trust* are illustrated by the following decisions.

The first case was *Iovino v. Waterson.*[38] The controversy centered around whether a federal court sitting in New York should allow a personal representative of a New Jersey decedent to be substituted. New York forbade such substitution, but Federal Rule 25(a)(1) allowed it. The federal court saw fit to ignore the state law and follow its own rule. Two reasons were set forth for permitting revivor by a foreign administrator: (1) New York had no *policy* against revivor, as evidenced by the fact that state legislation had twice been passed allowing substitution; however, the Court of Appeals of New York, through mistake,[39] held them in violation of the fourteenth amendment to the United States Constitution,[40] and (2) there was a strong federal *policy,* as expressed in Rule 25(a)(1), allowing revivor. The court went on to say this issue falls in

> [A] twilight zone . . . where a rational classification could be made either way. . . . [T]he positive inference from Article III and the "Necessary and Proper" clause outweighs the negative inference from the limited grant of legislative power in Article I, § 8, and the Tenth Amendment that must have afforded the basis for the constitutional precept of Erie.[41]

In *Iovino* an additional, and very important factor is utilized to modify the *Erie-Guaranty Trust* rule. Even where a state law forbids, the federal court may allow revivor, if the countervailing federal policies permit.

The second decision was *Monarch Insurance Company v. Spach,*[42] involving the applicability of Rule 43(a) of the Federal Rules of Civil Procedure. The case was appealed to the Fifth Circuit and involved the question of whether written statements from an injured person were admissible when such person had not been given a copy of the statements. Florida had held such statements to be inadmissible, while Rule

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[37] *Ibid.*

[38] 274 F.2d 41 (2d Cir. 1959), *cert. denied,* 362 U.S. 949 (1960).

[39] *Id.* at 43-44.

[40] See Helme v. Buckelew, 229 N.Y. 363, 128 N.E. 216 (1920); McMaster v. Gould, 240 N.Y. 379, 148 N.E. 556 (1925).

[41] 274 F.2d 41, 48 (2d Cir. 1959).

[42] 281 F.2d 401 (5th Cir. 1960).

43(a) of the Federal Rules held to the contrary. A federal district court in Florida refused admission, and the Fifth Circuit reversed.[43] Against the possibilities of a difference in outcome, the court looked to the importance of retaining an independent and workable federal judiciary. Further, the court felt that not only was it important to retain some resemblance of a federal court system, but also that the federal judiciary maintain an approach of uniformity in line with that suggested by the Federal Rules and the enabling act. So far, it appeared that *Erie-Guaranty Trust* would be applicable only where there was no countervailing federal policy. However, the court went on to say that Florida had *no* policy contrary to Rule 43(a) and, in fact, it was the policy of Florida to encourage the disclosure of statements taken from such witnesses. The court in *Monarch,* it is submitted, correctly ignored the "substance-procedure" dichotomy enunciated in earlier decisions. Here, in a conventional sense, the Florida rule was clearly one of procedure. Despite this, its application would probably have had a significant bearing upon final determination of the issues. By choosing not to follow state law, the federal court to a large degree nullified *Guaranty Trust* and *Erie.* To the extent that a federal rule is involved, or for that matter any declared federal policy, a litigant may obtain a result in federal court different from that which he would have otherwise received in the state court. For this reason, *Monarch* might well result in forum shopping, a practice which *Erie* attempted to correct, and for which *Swift* was overruled.

A third modification of *Byrd* came with *Jaftex Corporation v. Randolph Mills, Inc.*[44] The question involves service of process upon a foreign corporation. The federal court assumed that under state law the corporation did not have sufficient contacts to be amenable to service. Judge Clark, writing the majority opinion for the Second Circuit, held that if the federal standard were met, despite a contrary state rule, the corporation would be within the jurisdiction of the court despite a contrary state rule. Judge Clark found a strong policy among federal courts of applying their own standards with respect to service of process. He went on to say that service is

> [S]o much a part of the make-up of a federal court that it is not likely to be superseded, and the settled policy that federal courts should apply state substantive law in diversity cases does not go to the extent of requiring the contrary.[45]

In applying the federal standard Judge Clark attempted to do so within

[43] *Ibid.*

[44] 282 F.2d 508 (2d Cir. 1960), *overruled by* Arrowsmith v. United Press Int'l, 320 F.2d 219 (2d Cir. 1963).

[45] *Id.* at 512.

the confines of *Guaranty Trust*. He felt that the "outcome-determinative" test was inapplicable here, since there was no reason to assume that the outcome in the federal court sitting in North Carolina, the place of incorporation, would be any different from the outcome in a federal court in New York. The only question was whether suit was permissible in both jurisdictions. Judge Clark answered in the affirmative; it is submitted that his justification for not applying the "outcome-determinative" test is ill-founded. As has been previously stated, the purpose of *Erie* and *Guaranty Trust* was not to correct a lack of uniformity among various federal courts, but rather, to retard forum shopping between state and federal courts within the same state. The probability of a litigant walking across the street from the state courthouse into the federal court is much greater than the likelihood of his traveling from New York to North Carolina in order to obtain a favorable judgment. The litigant need only find some federal policy, despite adverse state "substantive" law for incentive to go forum shopping. Judge Clark might have tempered his opinion by following state "substantive" law unless the federal policy was expressed explicitly by Congress. Judge Friendly suggested that the Second Circuit take this course.[46] However, in his majority opinion Judge Clark expressly rejected this approach.[47]

It was not until three years later in *Arrowsmith v. United Press International*[48] that Judge Clark's approach was overruled in favor of Judge Friendly's. Suit was filed in a federal court in Vermont by a citizen of Maryland against a New York corporation. The issue concerned whether the federal court had properly taken jurisdiction. Judge Friendly, writing the majority opinion for the Second Circuit, stated that the issue was to be resolved by state law. If the state permitted its courts to assume jurisdiction over a foreign corporation, then the federal courts must do likewise. Further, the only federal question was whether there was sufficient contract under the Constitution to permit Vermont to assume jurisdiction. However, the court held that the constitutional question need not be resolved until the state rule was determined.

Finally, to the *Burd* construction of the "outcome-determinative" test another factor was added. The Seventh Circuit was called upon to hear a declaratory judgment action by an insurance company against its insured.[49] Suit was brought under the federal Declaratory Judgments Act.[50] The defendant established that Wisconsin, whose law would control if *Erie-Guaranty Trust* were to be followed, would not permit such an action because it was against that state's public policy. It then fell

[46] *Id.* at 516 (concurring opinion).
[47] Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d 508 (2d Cir. 1960).
[48] 320 F.2d 219, 225 (2d Cir. 1963).
[49] Allstate Ins. Co. v. Charneski, 286 F.2d 238 (7th Cir. 1960).
[50] 28 U.S.C. § 2201 (1964).

upon the Seventh Circuit to determine if federal public policy as expressed by Congress would prevail over that of the state. The court decided to follow the rule of Wisconsin. The federal court found that Wisconsin had a "specific substantive policy"[51] which would be materially impaired if not followed by federal courts in diversity actions. If, as a general rule, the state disfavored declaratory judgments, it would be a different matter, but the state policy is simply one against allowing insurance companies to utilize this device. The federal policy favoring declaratory judgments, then, is not in conflict with the state rule, reasoned the court.

While this case would appear to be governed by the "outcome-determinative" test, the court devoted more time to contrasting and weighing Wisconsin's public policy against that of the United States. While the result here differs from that reached in the three preceding decisions, a factual distinction is difficult to find. In *Monarch*[52] the court found that Florida public policy favored construing discovery rules liberally, but not with respect to insurance companies. This was in line with liberal federal rules of discovery.[53] Despite this, the Fifth Circuit decided to reject the Florida approach and adhere to federal practice. While it may be difficult to distinguish the reasoning of the Fifth and Seventh Circuits, other than to say they are two different courts, an explanation may be found for the attitude which was present in the Second Circuit.[54] Judge Clark, who consistently found avenues of escape from the "outcome-determinative" test, was an author of the Federal Rules of Civil Procedure, and followed the philosophy that the federal judiciary should be given complete freedom in formulating and applying rules of practice within its own court despite a different outcome.[55] Notwithstanding Judge Clark's dissent in *Arrowsmith*,[56] it appears that his influence on the court has lessened substantially since his departure from the bench, and the influence of Judge Friendly has become dominant.

The argument among the federal courts as to the difference between "substance" and "procedure" continues, and along with it the issue of what comes within and what remains outside the "outcome-determinative" test. Much of the confusion has centered around a fear that such a test would nullify the Federal Rules. The United States Supreme Court

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[51] Allstate Ins. Co. v. Charneski, 286 F.2d 238, 244 (7th Cir. 1960).

[52] Monarch Ins. Co. v. Spach, 281 F.2d 401 (5th Cir. 1960).

[53] See *id.* at 410-13.

[54] *Compare* Iovino v. Waterson, 274 F.2d 41 (2d Cir. 1959), *with* Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d 508 (2d Cir. 1960).

[55] See Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d 508 (2d Cir. 1960).

[56] Arrowsmith v. United Press Int'l, 320 F.2d 219, 234 (2d Cir. 1963) (dissenting opinion).

went a long way toward eradicating any doubt as to the effect of the Rules when it handed down the decision in *Hanna v. Plummer*.[57]

Hanna involved an automobile accident for which plaintiff, an Ohio citizen, brought an action in negligence against the estate of decedent, a citizen of Massachusetts. In compliance with Federal Rule 4(d)(1) process was served on decedent's wife at her home; however, this was insufficient under a Massachusetts statute[58] which required service in hand no later than one year after the executor had posted bond. The district court, applying the doctrines of *Ragan v. Merchants Transfer & Warehouse Co.*[59] and *Guaranty Trust*,[60] held the service to be insufficient. On appeal the circuit court affirmed on the basis that service here was a "substantive" matter. After granting certiorari, the Supreme Court considered the decision a threat to uniformity and reversed the lower court. It reasoned that where a state and federal rule conflict in a diversity case, the federal rule must prevail. However, this is subject to certain limitations. First, the federal rule must be constitutional; and second, it must comply with the rules enabling act.[61] By relying on *Sibbach v. Wilson & Co.*,[62] the Court found these two standards were met.

The preceding cases do much to modify the meaning of the Judiciary Act of 1789 as interpreted under *Erie*. It might be said that, as a general rule, a federal court sitting in a diversity action must follow the law of the state, whether evidenced by statutes or cases, procedural or substantive, unless there is a conflicting federal rule of law. If the two are conflicting and both are substantive, the state law will be followed. If both are procedural, the federal law will probably be applied. If the state law is procedural and the federal law substantive, the federal law will be applied; and, if the federal law is procedural and the state law substantive, the court will look to the policies of the two sovereigns to determine which should be protected. In the last situation the trend has been to follow the federal rule of law in order to effectuate uniformity among the federal courts.[63] It might be added that this is consistent with one objective of *Erie* in promoting uniformity; but to the extent that forum shopping is fostered, there is a conflict with the policy of discouraging forum shopping expressed in *Erie-Guaranty Trust*.

One of the liberal constructionists of the Federal Rules was Judge Clark of the Court of Appeals for the Second Circuit. Judge Clark's

[57] 380 U.S. 460 (1965).

[58] MASS. GEN. LAWS ANN. ch. 197, § 9 (1958).

[59] 337 U.S. 530 (1949).

[60] Guaranty Trust Co. v. York, 326 U.S. 99 (1945).

[61] 28 U.S.C. § 2072 (1964).

[62] 312 U.S. 1 (1941).

[63] See Mutual Int'l Export Co. v. Napco Indus., Inc., 316 F.2d 393 (D.C. Cir. 1963).

view was that one should not confine himself to a traditional definition of procedure in determining whether or not to apply the federal rule.[64] Further, where there was a conflict between a state and federal rule, the former should be applied only when it is "unequivocally disclosed by some clear state statute or decision"[65] that the matter was one of substance. Second, Judge Clark asserted that in making a determination, the court should keep in mind the intent of the Federal Rules, which is to "establish a uniform flexible procedure . . . to be a model for the various states . . . ."[66] Third, the policies of the two jurisdictions should be weighed with the idea of effectuating the best rule. The mere fact that "a particle of substance"[67] is found should not outweigh the advantages of promulgating uniformity under federal procedure. Fourth, a "strong presumption should be indulged in that matters included in them [Federal Rules] as procedural are to be so held by the courts."[68] Finally, a federal court should never go outside the state in which it is sitting to find the issue in question to be one of substantive law which should be applied in lieu of a federal rule.[69]

One area which the courts, as a general proposition, have treated as "procedural" has been that of evidence.[70] This has been the approach taken by federal courts,[71] not as a result of logic, but due to necessity.[72] However, in some instances a rule of evidence might justifiably be categorized as "substantive." The parol evidence rule[73] and conclusive presumptions rules[74] are two examples. Further, the federal court may be precluded from applying its own rule in matters concerning burden of proof if it is found that the state rule is of a "substantive" nature.[75] The true test of admissibility or exclusion, as one writer pointed out, is the "outcome-determinative" test, not whether the evidence falls within the realm of "substance" or "procedure."[76] Using this standard a federal diversity action should follow state rules of forum non conveniens,

[64] Clark, *The Tompkins Case and the Federal Rules*, 24 J. Am. Jud. Soc'y 158 (1941).

[65] *Id.* at 160.

[66] *Ibid.*

[67] *Ibid.*

[68] *Id.* at 161.

[69] *Ibid.*

[70] See Conn v. Young, 267 F.2d 725 (2d Cir. 1959).

[71] Monarch Ins. Co. v. Spach, 281 F.2d 401 (5th Cir. 1960); Note, 39 Texas L. Rev. 680 (1961).

[72] 5 Moore, Federal Practice § 43.02 (2d ed. 1966).

[73] Patterson-Ballagh Corp. v. Byron Jackson Co., 145 F.2d 786 (9th Cir. 1944).

[74] See generally Dick v. New York Life Ins. Co., 359 U.S. 437, 446 (1959); 9 Wigmore, Evidence § 2492 (3d ed. 1940).

[75] Palmer v. Hoffman, 318 U.S. 109 (1943).

[76] Hope v. Hearst Consol. Publications, Inc., 294 F.2d 681, 691 (2d Cir. 1961) (dissenting opinion).

judicial notice, statutes of fraud, and rules respecting measure of damages.[77] This, however, is not the only standard. Because of a desire for uniformity among the various districts, a desire for "home-rule," the federal courts are now being given greater latitude in determining the admissibility of evidence under Rule 43(a).[78]

On its surface Rule 43(a) is very simple, allowing admission of evidence in federal diversity suits on any one of three bases. First, the evidence will be admitted if a United States statute can be found which would have permitted its admission. Second, if it is found that such evidence was admissible in federal law or equity actions prior to this rule, it will continue to be admissible. Third, if the state in which the district court is sitting permits the introduction of such evidence, it will be admissible in the federal proceeding.[79] The majority of courts have held Rule 43(a) to be one of admission, not exclusion.[80]

The federal courts have not always been allowed so much freedom in admitting evidence. Prior to 1938 three statutes limited the authority of a federal judge to independently determine questions of evidence. The first two were the Judiciary Act of 1789,[81] which has been the underlying theme of this comment, and the Conformity Act.[82] In applying these statutes the various circuits required the federal district courts to apply the statutory rules of evidence of the states in which they sat. However, there were differences of opinion as to whether the states' common law rules of evidence were to be followed.[83] A third statute, the Competency of Witnesses Act,[84] applied both to law and equity proceedings and required federal courts in diversity cases to follow state rules governing competency of witnesses.

Realizing that federal evidence practice needed to be clarified and modernized, and that federal procedure reform would be incomplete without a consideration of the evidence question, Rule 43(a) was adopted.[85] While Rules 43 and 44 might both be called rules of evidence, it is section (a) of Rule 43 which has "revolutionized" federal practice, so one court assumed.[86] Despite the fact that Rule 43(a) is based on relevancy and materiality, and is a rule of admission and not exclusion,[87]

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[77] GOODRICH, CONFLICTS § 15 (4th ed. 1964).

[78] FED. R. CIV. P. 43(a).

[79] For a more complete discussion see Comment, *The Admissibility of Evidence Under Federal Rule 43(a)*, 48 VA. L. REV. 939 (1962).

[80] *E.g.*, Wright v. Wilson, 154 F.2d 616 (3d Cir. 1946).

[81] 1 Stat. 92 (1789), REV. STAT. § 722 (1875) (now 28 U.S.C. § 1652 (1964)).

[82] 17 Stat. 197 (1872).

[83] Comment, *The Admissibility of Evidence Under Federal Rule 43(a)*, 48 VA. L. REV. 939, 941 (1962).

[84] 34 Stat. 618 (1906).

[85] 5 MOORE, FEDERAL PRACTICE § 43.02 (2d ed. 1966).

[86] United States v. Vehicular Parking, Ltd., 52 F. Supp. 751 (D. Del. 1943).

[87] 5 MOORE, FEDERAL PRACTICE § 43.04 (2d ed. 1966).

its practical impact is doubtful. There are few federal statutes governing evidence; most federal equity cases are decided on issues other than evidentiary ones; and, because of the three previously mentioned statutes, federal law courts, as a general rule, have followed the state law of evidence.[88] However, the presumption that the federal courts would follow their old practice regarding evidence seems to be ill founded. An examination of the cases indicates that federal courts are now admitting evidence that would probably have been excluded prior to Rule 43(a).

One of the first cases involving the construction of Rule 43(a) was *Wright v. Wilson.*[89] The plaintiff brought an action in negligence for injuries arising out of an automobile collision. The plaintiff alleged that after the defendant's death, plaintiff was the only eyewitness. The trial court refused to admit the testimony against defendant's estate because of the Pennsylvania Dead Man statute.[90] Assigning this as error and relying on Rule 43(a), the plaintiff appealed. The court of appeals held the rule to be one of admission, not exclusion. Further, it held that if the evidence were admissible through either state law, federal law, or federal equity rules, it was admissible here. The appellate court found no state or federal rule or statute permitting admission, and so, upheld the decision of the federal trial court. The court of appeals made no mention of *Erie,* and seemed not the least concerned about the "outcome-determinative" test established a year earlier in *Guaranty Trust.* The probability of a difference in outcome in the instant case appears more likely than not if one considers the consequences of permitting the testimony under such federal rule of equity or statute. However, the court found no rule of admission, and resolved its problems easily.

Two years later the Fourth Circuit had an opportunity to construe Rule 43(a).[91] The plaintiffs brought an action for conversion of money left with defendants. The district court found for the plaintiffs, and the defendants alleged, as one of several errors, that it was prejudicial to admit evidence that defendant had been previously convicted of receiving stolen goods. In finding that the trial court had admitted this evidence only after the defendant had put his good character in issue, the appellate court affirmed, holding: "It is quite obvious from the language of this Rule that, in doubtful cases, the doubt should be resolved in favor of the admissibility of the evidence."[92]

From these early decisions a rule seems to have evolved. One of the first cases held evidence admissible because there was no federal rule, policy, or statute which would forbid its exclusion, and further,

[88] See 3 Moore & Friedman, Federal Practice § 43.01 (1938).
[89] 154 F.2d 616 (3d Cir. 1946).
[90] Pa. Stat. tit. 28, § 322 (1936).
[91] See Mourikas v. Vardianos, 169 F.2d 53 (4th Cir. 1948).
[92] *Id.* at 59.

because there was an explicit state rule allowing its admission.[93] The second case involved a situation where evidence was excluded because there was no rule or law, state or federal, which would allow its admission. However, the court said admission was favored over exclusion if a basis for admission could be found.[94] In the third case the court held that where admission was doubtful and there were no rules explicitly admitting the evidence, Rule 43(a) should be looked to, and the evidence should be allowed.[95]

These decisions do not appear to have influenced a federal district court in North Carolina. There an action was instituted against the defendants for malicious prosecution at an earlier date under the Fair Trade Laws. The former action was nonsuited and the plaintiff here contends this establishes that the defendant brought the previous action in bad faith and without probable cause. In granting a motion for dismissal the court held that the mere fact that the prior action was nonsuited does not establish lack of probable cause. The plaintiff argued that under North Carolina law a mere scintilla of evidence entitled the issue to be submitted to the jury, and that the federal trial court was obligated to follow the state rule. The judge, however, held that the federal law must be applied, and that state standards were not applicable.[96] Since this case involved submission of evidence to the jury, if a rule could be found permitting such action, it would appear that Rule 43(a) would command the trial judge to follow the North Carolina decisions. However, there was no mention of Rule 43(a) by the plaintiff, and the court did not choose to utilize it.

Probably two of the most far-reaching decisions have come out of the Court of Appeals for the Fifth Circuit. The first case involved a suit by an Alabama county to recover on an insurance contract for damages to its courthouse when its clock fell through the roof. The county contended that the destruction was caused by lightning and thus covered by the provisions of the policy. The defense countered, saying the damage resulted from poor structural design and weak rafters which were not sufficient to withstand the added weight of a recently installed air-conditioning unit. If the contentions of the defendant were correct, no recovery would be allowed. The plaintiff established that the rafters were burned and charred, evidencing lightning. However, over plaintiff's objection, defendant introduced a 58 year-old newspaper account of a fire in the courthouse which offered another explanation for the charred wood. The jury returned a judgment for the defendant. On appeal the court seemed undecided whether the newspaper could be introduced

[93] See Stoner v. New York Life Ins. Co., 311 U.S. 464 (1940).
[94] Wright v. Wilson, 154 F.2d 616 (3d Cir. 1946).
[95] Mourikas v. Vardianos, 169 F.2d 53 (4th Cir. 1948).
[96] See Warner v. Gulf Oil Corp., 178 F. Supp. 481 (M.D.N.C. 1959).

under any of the three categories found in Rule 43(a), and concluded that it made no difference. Rule 43 is a rule of admission and should be viewed in that light. Further, *Erie* has no application here since the question is "procedural" and not "substantive." Then the court reached the surprising conclusion that if the evidence fails to fit into any of the three categories of Rule 43(a), the court must look elsewhere. Some emphasis was placed on the fact that at the time of the alleged fire Selma was a small town, and that such an account would be very reliable in a sparsely populated area. A newspaper would suffer much embarrassment if such an account were in error, and thus, the newspaper was probably correct. Further, locating the author of the article probably would be impossible after so many years. In addition, it was reasonable to assume that the newspaper account was more reliable than the memory of a witness to a fifty-eight year-old fire. The court held that this type of evidence is universally regarded as hearsay and does not fall within either the business records or the ancient documents exception.[97] However, since the bases for exceptions to the hearsay rule are "necessity" and "trustworthiness," the account should be received in evidence. Further, the newspaper is admissible under Rule 43(a) "because it is necessary and trustworthy, relevant and material, and its admission is within the trial judge's exercise of discretion in holding the hearing within reasonable bounds."[98]

It is submitted that this decision is not in line with *Erie*, and for that reason is incorrect. The court's approach is too restrictive in its attempts to define evidence. Simply holding the matter to be "procedural," the court applied a federal standard despite the fact that the outcome might well have been different. By looking to the "outcome-determinative" test, as well as *Erie*, the court would have incurred more difficulty in classifying the matter as one of "procedure." Further, whether or not *Erie* was looked to as a guiding principle, the Fifth Circuit went beyond the rather broad confines established by Rule 43(a). When it was found that none of the avenues of admissibility were available under the rule, the court rode its judicial bicycle down a back alley. Now, not only may a court look to (1) state law (and probably policy), (2) federal statutes and rules of law, or (3) federal equity practice to allow admission, but if these fail, the court in its discretion may (4) look to text writers, (5) to the rules of forty-nine other states or a combination of them, or (6) simply apply what seems to be reasonable to the court. In the face of *Erie-Guaranty Trust* the courts may arbitrarily apply the rule they think best, and with respect to the last three newly formulated avenues, the courts may view Rule 43(a), not as restrictive in any sense,

[97] Dallas County v. Commercial Union Assur. Co., 286 F.2d 388, 397-98 (5th Cir. 1961).

[98] *Id.* at 398.

but as a roadsign guiding other bicycles down newly discovered back alleys.

The Fifth Circuit was given another opportunity to apply Rule 43(a) in *Hambrice v. F. W. Woolworth Co.*[99] This was a negligence action by a customer against a store owner in a "slip and fall" case. The Texas district court found for the defendant, and plaintiff appealed, assigning two errors: (1) the court erred in not allowing testimony that candy appeared as if it had been on the floor at least two or three days; and (2) the court erred in admitting defendant's statement that it was the employee's habit to sweep the floor every morning, that he looked where he swept, that he never left anything on the floor to the best of his memory, and that if anything had been on the floor he would have swept it up. The Fifth Circuit decided that the exclusion of plaintiff's testimony was proper since it was opinionated and invaded the province of the jury; and that defendant's testimony was properly admitted under the habit exception. The court rejected the only case cited by the plaintiff as establishing Texas law on the point in question, and relied on the ALI Model Code of Evidence which had not been adopted by Texas. The majority held that under Rule 43(a) the court could adopt the more liberal rule for admission purposes, and if the state rule is the least liberal, the court is not bound by it and may follow a more flexible federal standard. In this situation there was neither a federal nor a state rule favoring admission; only a state rule demanding exclusion. The court felt that:

> The Federal Rules of Civil Procedure indicate a general policy to disregard technicalities and form and to determine rights of litigants on the merits and to that end the rules are liberally construed.[100]

From this statement one can conclude that the Fifth Circuit has reaffirmed its position of looking to text writers for a rule where displeasure is found with those espoused by the state in which it sits. It is submitted that the court's explanation of "liberal" and "technicalities" is strained, and cuts as a one-edged sword. By disregarding the mandates of *Erie-Guaranty Trust* and by going outside the confines of Rule 43(a), the court has adopted an arbitrary formula. The instant case is indicative of this approach. The testimony of both defendant and plaintiff was opinionated. Neither was disinterested. Yet, in one instance the testimony was admitted under a "liberal" justification, while in the other it was rejected. The only distinction is that the former was substantiated by habit, while the latter was not. This seems unimportant if the court is truly going to disregard "technicalities."

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[99] 290 F.2d 557 (5th Cir. 1961).

[100] *Id.* at 559.

Not all courts have forgotten the significance of *Erie*. The Third Circuit held Rule 43(a) of no avail when it rejected medical testimony because it would have been denied admission under Pennsylvania law.[101] The plaintiff attempted to establish that her hepatitis resulted from drugs prescribed by a physician to correct injuries received in a "slip and fall" accident in the defendant's store. The federal court, holding the testimony inadmissible under Pennsylvania law because of uncertainty, stated:

> We are still of the view that in a diversity case where the sufficiency of the evidence goes to the maintenance of the substantive right, as here, the law of the state must prevail.[102]

Because of the conceptual difficulties involved in the types of problems discussed here, it is difficult to reach any definite conclusions based on any legal principles. Not only are the concepts often tricky, but in addition they are seldom resolved by the highest court in the land. As a general rule, the "substance-procedure" issue goes no higher than the courts of appeal. With all the considerations that need to be kept in mind, *i.e.*, the distinction between "substance" and "procedure," what will and will not ultimately affect the outcome, what promulgates uniformity and what encourages forum shopping, it is difficult to predict what attitudes are held by members of the United States Supreme Court.

One recent decision, while not involving Rule 43, went a long way to substantiate this writer's point of view. In essence the decision reinvigorates the *Erie-Guaranty Trust* doctrine, while at the same time, tends to effectuate the Federal Rules of Civil Procedure. *Van Dusen v. Barrack*[103] involved a negligence action arising out of an airplane crash. The plane took off from Boston on its way to Philadelphia when it crashed into the Boston Harbor. The plaintiff's personal representative brought this action in Pennsylvania, whereupon the defendant moved under 28 U.S.C. section 1404(a) for a transfer to the Massachusetts federal court. The motion was granted by the district court. On appeal the circuit court reversed basing its decision on Rule 17(b). The case was then taken to the United States Supreme Court where a determination was made of the proper relationship between state and federal authority.

Before discussing the decision of the Court it is important to mention the reasons why the parties desired to have the suit tried in federal

[101] Sleek v. J. C. Penney Co., 324 F.2d 467 (3d Cir. 1963). However, where there is no state prohibitive law and no federal law or rule of equity permitting admission, the matter will be settled according to principles of relevancy and materiality. Schabo v. County of Mercer, 333 F.2d 971 (3d Cir. 1964).

[102] Sleek v. J. C. Penney Co., 324 F.2d 467, 471 (3d Cir. 1963).

[103] 376 U.S. 612 (1964).

courts of different states. The plaintiff wanted the action tried in Pennsylvania because: (1) the deceased was from Pennsylvania and the jury would be more sympathetic; (2) if defendant were found liable, there was no limitation on the amount of damages which could be recovered; and (3) while the plantiff's representative was not qualified to sue in the state courts of Massachusetts, there was doubt as to whether suit was maintainable in the federal courts of that state under Rule 17(b). The defendant wanted the case transferred to Massachusetts because: (1) Rule 17(b) might enable the action to be dismissed; (2) a Massachusetts statute limited liability to 20,000 dollars; and (3) the forum was more convenient under section 1404(a).

The problem was whether section 1404(a) conflicted with Rule 17(b). Rule 17(b) simply states that "[C]apacity of an individual . . . to sue or be sued shall be determined by the law of his domicile."[104] If the suit were brought in Pennsylvania, no problem would arise since the representative was qualified to sue in that state; but if suit were maintained in Massachusetts, a dismissal might be forthcoming since plaintiff's representative had not qualified in Massachusetts. Section 1404(a) permits transfer of actions where it is convenient for all concerned, and it reads as follows:

> For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it *might have been brought.*[105] (Emphasis added.)

In holding that section 1404(a) and Rule 17(b) were not in conflict, the Supreme Court said the restrictive words "might have been brought" referred to federal, not state law. *Hoffman v. Blaski*[106] was distinguished on the basis that neither venue nor jurisdiction was present in the transferor court, while in the instant case both were present. The Court went on to say that the federal policy permitting a change of forum, where convenience demands, cannot be restricted by a state law. If suit were properly brought in a federal district court of one state, that action could not be dismissed at a later date on a motion by an adverse party in a transferor court where the dismissal would have been unsuccessful except for the transfer. On the other hand the plaintiff cannot destroy the usefulness of section 1404(a) by relying on the possibility of a dismissal in the transferor court. If this were permitted, a representative might simply refuse to qualify in all states except the one in which he wished to have the suit tried, despite the fact that it might be the most inconvenient forum.

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[104] FED. R. CIV. P. 17(b).
[105] 28 U.S.C. § 1404(a) (1964).
[106] 363 U.S. 335 (1960).

In looking to Rule 17(b) the Court said it must first determine if the law of the transferor state is significantly different from that of the transferee state, and then what bearing this difference will have on "the interest of justice."[107] The defendant argued that the action should be transferred because no matter which state entertained the action, the Massachusetts limitation of liability statute would govern because the tort was allegedly committed in Massachusetts. Even if suit were continued in Pennsylvania, the federal district court following *Klaxon*[108] and the Pennsylvania conflicts rule, would apply Massachusetts law and limit liability. However, the plaintiff argued that there was a possibility that if suit were continued in Pennsylvania, the Pennsylvania court would adopt the *Kilberg v. Northeast Airlines, Inc.*[109] and *Pearson v. Northeast Airlines, Inc.*[110] rules and apply Pennsylvania's measure of damages, but follow the Massachusetts rule respecting liability. In resolving this problem the Court held that the cause may be transferred, but the "possibility" that Pennsylvania courts might adopt the "center of contacts" rule must be protected for the plaintiff. Thus, if Pennsylvania does adopt such an approach before the district court of Massachusetts decides the extent of liability, Pennsylvania law must be looked to.

The Court stated that *Erie-Guaranty Trust* was not defeated by requiring a federal district court sitting in Massachusetts to follow Pennsylvania law. Further, while *Erie* required a federal court in a diversity suit to apply the law of the state in which it sat, it would be superficial to say that in the instant case Massachusetts law must be followed. *Klaxon*, for instance, held that *Erie* established "the principle of uniformity within a state."[111] *Van Dusen* cites *Guaranty Trust* for the proposition that:

> The nub of the policy that underlies *Erie R.R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a nonresident litigant in a federal court instead of in a State court a *block away* should not lead to a different result.[112] (Emphasis added.)

Here the Court held that since the suit was properly filed in Pennsylvania, the fact that it was transferred at the insistence of the defendant and for his benefit will not alter the law which would have been applied originally. The federal court of Massachusetts will look to the entire law of Pennsylvania, as would have originally been done if the suit had not

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[107] Van Dusen v. Barrack, 376 U.S. 612, 626 (1964).
[108] Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).
[109] 9 N.Y.2d 34, 172 N.E.2d 526 (1961); Note, 74 HARV. L. REV. 1652 (1961).
[110] 309 F.2d 553 (2d Cir. 1962).
[111] Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941).
[112] Van Dusen v. Barrack, 376 U.S. 612, 638 (1964).

been transferred. However, the federal court in Massachusetts is still free to apply its own rules of practice. Finally, the Court held that section 1404(a) allows a change of courtrooms, not of law.

The Supreme Court reversed and remanded so that the federal district court could determine if a section 1404(a) transfer was justified in light of the fact that Pennsylvania state courts might possibly alter the state conflicts laws. Whether or not the Massachusetts federal court is the most convenient forum is a question to be resolved at the discretion of the trial judge.

In concluding, it must be admitted that arguing *Erie* from a tenth amendment standpoint is, at best, tenuous. However, it is submitted that the underlying basis of that decision, mainly to prevent forum shopping, is as valid and necessary today as ever before. This is true whether the litigant is looking for a more favorable forum for the purpose of a "substantive" matter, or whether he simply feels that evidence will be more easily admissible in one forum than in another. To that extent, all federal rules, whether concerning evidence, discovery proceedings, or notice should not result in a different outcome in the federal court from that of the state. Instead of looking for more streamlined methods of procedure in federal district courts, perhaps the leading jurists should seek to abolish federal diversity jurisdiction altogether. The old justifications are gone, if truly there ever were any.[113]

Bill P. Joyner

[113] See generally Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928).

STUDENT NOTES

Constitutional Law—Application of Basic Constitutional Guarantees to Juveniles

There has long been agitation for change in the field of the juvenile courts. Recently the United States Supreme Court, with an open ear to this hue and cry, decided that certain basic constitutional guarantees were not limited to adults in the case *Application of Gault*.[1] Although much work has been done in this area, most states will have a great amount of adaptation and implementation to make. It is the purpose of this note to analyze the trends leading up to this decision,[2] how it compares with present law, and the impact it will have on our juvenile court system.

The facts of Gerald Gault's case and the events that took place present a disturbing picture of the abuses rampant in the area of juvenile law.[3] Gerald Gault's arrest on June 8, 1964, arose out of a verbal complaint by a neighbor over a telephone call allegedly made by Gerald and a friend in which the callers made lewd or indecent remarks.[4] From this point events quickly unfurled pulling Gerald into the grinder of quasi-criminal justice.

Much may be said about juvenile court procedure affording less protection to the young offenders than the general criminal system affords his elder counterpart,[5] but a brief excerpt from the appellant's brief in *Gault* emphasizes the point.[6]

Gerald Gault was arrested by the sheriff, detained by a probation officer without a court order, and interrogated at length. His parents were notified neither of the arrest nor of the grounds for it. They received only one written notice, and it was contained in a note Mrs. Gault received from the probation officer on June 12 about the continuance of the hearing on Gerald's delinquency. The time appellants had for preparation of the case was extremely short, and the hearing consisted mainly of hearsay statements. There were no sworn witnesses, and the complainant was never present, even though her presence was requested by the appellant. The judge decided it was not necessary. The judge's finding of delinquency was derived from "the boy's statement as to the use of lewd language"[7] and in his "habitual involvement in immoral matters,"[8] which was based on a referral report the judge had received. There was never an accusation or hearing on this matter, and appellant was given neither notice of the report nor opportunity to deny or defend against its charges.

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[1] 87 S. Ct. 1428 (1967).

[2] *Id.*

[3] *See* Application of Gault, 99 Ariz. 181, 407 P.2d 760 (1965).

[4] Application of Gault, 87 S. Ct. 1428, 1431 (1967).

[5] Comment, *Criminal Offenders in the Juvenile Court: More Brickbats and Another Proposal*, 114 U. Pa. L. Rev. 1171, 1214 (1966).

[6] *See* Children in the Courts—The Question of Representation 329-30 (G. Newman ed. 1967).

[7] *Id.*

[8] *Id.*

In both hearings appellants appeared without counsel and were neither informed of a right to counsel nor told they would be furnished counsel in case of need. The commitment order taking the child from his parents for up to six years was made without investigation of his environment or previous warning of such drastic action. Finally, there was no transcript kept of the proceedings and no provision for appellate review.[9]

"It is plain that in this case Arizona largely if not wholly dispensed with the basic procedural protections that are understood to comprise 'due process of law.'"[10] The proposition offered by the Arizona Supreme Court that "the Juvenile Court stands in the position of a protecting parent rather than a prosecutor . . ."[11] must have caused serious reflection in the minds of Gerald and his parents, and the "aim of the court to provide individualized justice for children"[12] must have seemed equally questionable.

From this brief introduction into the case of Gerald Gault it will be necessary to delve briefly into the origin of the juvenile court movement and the forces behind its growth. The juvenile court was a bold advance toward an enlightened solution of an extremely serious and complex problem. It has a distinctive place in our judicial system, and it will retain this place as long as the need exists.[13] In Roscoe Pound's view the creation of the juvenile court came as a logical step in the development of American jurisprudence to meet the nation's changing social needs.[14] There is, however, much diversity of opinion concerning the net worth of the juvenile system, and the degree to which it has carried out its function. Most agree, however, that the founding of the juvenile court has been "one of the most outstanding improvement(s) in the administration of criminal justice . . ."[15] that has occurred in many centuries.

In 1899 in Chicago a group of public-minded citizens, properly horrified at the sight of easily impressionable youngsters being handled in the same court with hardened criminals, created a new court—the juvenile court.[16] From the statute adopted in Illinois in 1899 the system has spread to every state in the Union, the District of Columbia, and Puerto Rico. The constitutionality of the juvenile court law has been upheld or sustained in over forty jurisdictions,[17] Mississippi being one of them.[18]

The architects of the new laws were attuned primarily to sociology

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[9] *Id.*

[10] *Id.*

[11] Application of Gault, 99 Ariz. 181, 407 P.2d 760, 765 (1965).

[12] *Id.*

[13] Polou, *The Juvenile Court: Effective Justice or Benevolent Despotism?* 53 A.B.A.J. 31, 35 (1967).

[14] Pound, THE JUVENILE COURT AND THE LAW (1944); Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775, 801 (1966).

[15] 31 Am. Jur. *Juvenile Courts* § 2 (1958).

[16] Gardner, *The Kent Case and the Juvenile Court: A Challenge to Lawyers*, 52 A.B.A.J. 923 (1966).

[17] Application of Gault, 87 S. Ct. 1428, 1437 (1967).

[18] Bryant v. Brown, 151 Miss. 398, 118 So. 184 (1928); Wheeler v. Shoemake 213 Miss. 374, 57 So. 2d 267 (1951).

and not the law. They created a court that abandoned or disregarded many established legal concepts and provided for a treatment program by which cases coming before it were treated as social problems.[19] Accordingly, the best motives and most enlightened impulses led to a peculiar system for juveniles unknown to our law in any comparable context; however, "the constitutional and theoretical basis for this peculiar system is—to say the least—debatable."[20]

There are two major themes underlying Juvenile Court philosophy:

1. An adjudication to determine whether a minor is a juvenile delinquent because [of] the alleged commission of criminal acts is not a criminal action, and
2. The purpose of juvenile court proceedings is the treatment and rehabilitation of the minor rather than the punishment of a criminal offender.[21]

The first of these themes stresses the fact that an adjudication finding a minor to be delinquent should not carry with it the stigma and social disgrace that is normally associated with the conviction of an adult. The second is generally referred to as the *parens patriae* philosophy of the courts. This philosophy led to the informal procedures of fact finding and sentencing found in juvenile courts because those expressing this philosophy asserted that its basis required a hearing conceived as " 'a search for the truth' rather than a normal criminal trial with its 'overly legalistic' or 'technical' procedures and rules of evidence."[22] The Mississippi rule that the juvenile courts are not criminal,[23] but quasi-criminal,[24] is the accepted view; the Youth Court Act[25] clearly classifies the Youth Court's jurisdiction as one of a civil nature.[26]

Much criticism over the various juvenile court acts has been launched, and it must be realized that criticism and critical analysis are essential to the proper evolution of this institution and "its adaptation to current realities."[27] The most frequent criticism is that the juvenile court proceeding affords less protection to the young criminal offender than the general criminal system affords his elder counterpart.[28]

The juvenile court, both in theory and practice, is an institution of remarkable complexity. It is continually called upon to handle a complexing variety of functions and duties. It administers what should be or

[19] Gardner, *The Kent Case and the Juvenile Court: A Challenge to Lawyers*, 52 A.B.A.J. 923 (1966).

[20] Application of Gault, 87 S. Ct. 1428, 1438 (1967).

[21] Comment, *Criminal Offenders in the Juvenile Court: More Brickbats and Another Proposal*, 114 U. Pa. L. Rev. 1171, 1214 (1966).

[22] *Id.* at 1176.

[23] Bradley, *1965-66 Mississippi Supreme Court Term—Some Significant Cases*, 38 Miss. L.J. 1, 14 (1966).

[24] Monk v. State, 238 Miss. 658, 660, 116 So. 2d 810, 811 (1960).

[25] Miss. Code Ann. §§ 7185-01 to -30 (1956).

[26] Wheeler v. Shoemake, 213 Miss. 374, 388, 57 So. 2d 267, 274 (1952).

[27] F. Allen, The Borderland of Criminal Justice 44 (1964).

[28] Comment, *Criminal Offenders in the Juvenile Court: More Brickbats and Another Proposal*, 114 U. Pa. L. Rev. 1171, 1214 (1966).

are classified as welfare functions, and it is also often required to provide a criminal prosecution forum. It is not only a court, but also a governmental agency charged with manifold administrative responsibilities and often the performance of clinical services.[29] Mr. Justice Fortas has said that "while there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guarantees applicable to adults. . . ."[30]

The essential difference between Gerald Gault's case and an ordinary, normally handled criminal case is that the safeguards available to adults were discarded. The summary procedure as well as the long commitment or incarceration were possible only because Gerald was fifteen rather than over eighteen years of age.[31] If he had been over eighteen, he would not have been subject to the juvenile court proceedings.[32] For the particular offense involved the maximum punishment was a five dollar to fifteen dollar fine or imprisonment in jail for not more than two months. Instead he was committed for a maximum of six years.[33]

Thus it seems to be true that there exists a wide gap between the promise of the juvenile court and the reality. This situation has led many to a sense of crisis.[34] Evidence supports the concern that the child receives the worst of both worlds. He gets neither the constitutional protections accorded to adult offenders nor the supposed care, protection, and regenerative treatment postulated for children.[35]

Although Mississippi may be behind in many areas, there seems to have been an early realization of the problems facing the courts in handling youthful offenders and an honest attempt to meet this challenge. The Mississippi Supreme Court as early as 1928[36] recognized this and said:

> The liberty protected by the Fourteenth Amendment of the Federal Constitution may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect.[37]

So wide a gulf as was found in Gerald Gault's case between the state's treatment of the adult and that of the child requires a bridge far sturdier than mere verbalization or noble purposes can provide.[38]

Mississippi actively started building such a bridge beginning in 1916 with its first Juvenile Court Act. It provided for instituting proceedings

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[29] F. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE 44 (1964).

[30] Kent v. United States, 383 U.S. 541, 555 (1966).

[31] Application of Gault, 87 S. Ct. 1428, 1444 (1967).

[32] ARIZ. REV. STAT. ANN. §§ 8-201, 8-202 (1956).

[33] Application of Gault, 87 S. Ct. 1428, 1444 (1967).

[34] Paulson, *Juvenile Courts, Family Courts, and the Poor Man*, 54 CALIF. L. REV. 694, 707-09, 713 (1966).

[35] Kent v. United States, 383 U.S. 541, 556 (1966).

[36] Bryant v. Brown, 151 Miss. 398, 118 So. 184 (1928).

[37] *Id.* at 415.

[38] Application of Gault, 87 S. Ct. 1428, 1445 (1967).

against any delinquent, destitute, or abandoned child. These laws were subsequently amended in 1922 and incorporated into sections 5697-5721 of Hemingway's 1927 Code. They were later incorporated in Mississippi Code of 1930, sections 7247 et seq. and Mississippi Code of 1942 sections 6744-6763.[39]

By this act a juvenile department of the Chancery, Circuit, and County Courts was established. Each had original jurisdiction over delinquent, dependent, and neglected children under eighteen years of age. Frequently the Circuit Court proceeded against the juveniles criminally, thus showing need for a better method of dealing with children in the courts.[40]

In 1946 and 1948 the old laws were repealed, and the Youth Court Act was established.[41] Sections 7185-01 through 7185-30 removed jurisdiction from the Circuit Court and vested it exclusively in the Youth Court division of the Chancery and/or County Courts. The act gave the Youth Court exclusive original jurisdiction over delinquent and neglected children and classified the court's jurisdiction as civil in nature.[42] However, if a child is thirteen years of age or older and is charged with a felony, the court after a full investigation may certify such child for proper criminal proceedings to the proper court.[43] After the legislative enactment it was felt that "a fine piece of legislation" had been turned over to the courts.[44] But the problem had not been solved nor had the criticism been silenced.

If the court finds that the child is neglected or delinquent, it may place him in the care of a relative, in a suitable private institution, or in a state-supported training school until he attains his twentieth birthday.[45] In many instances and in many states juveniles are detained and brought in contact with older offenders. Even though the inherent danger of this practice has been recognized, most states have not taken the first small step in the direction of decency and logic to correct this situation.[46] The training schools in many instances are merely "catchalls," and often children are sent there because of either lack of sufficient probation service or under pressure of public sentiment. Mentally and physically handicapped children who get on the wrong side of the law are sent to training school because of the lack of better facilities. In Mississippi the deplorable and shocking truth is that even these inadequate facilities are not provided for all offenders, so that jail is often the only place where they may be kept.[47] Section 7185-06 of the Mississippi Code provides that no child shall be placed in a jail or any other place of detention with adults unless in the court's opinion he is deemed to constitute a menace to other persons or to assure his attendance in court. This section further provides that he is not to be placed in a room with adults.[48]

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[39] Wheeler v. Shoemake, 213 Miss. 374, 380, 57 So. 2d 267, 270 (1952).

[40] Comment, *Mississippi's Youth Court System*, 27 Miss. L.J. 133 (1956).

[41]. *Id.*

[42] Wheeler v. Shoemake, 213 Miss. 374, 388, 57 So. 2d 267, 274 (1952).

[43] Miss. Code Ann. § 7185-15 (1956).

[44] Haralson, *Mississippi's New Youth Court Act*, 17 Miss. L.J., 449, 453 (1946).

[45] Miss. Code Ann. § 7185-09 (1956).

[46] F. Allen, The Borderland of Criminal Justice 44 (1964).

[47] Comment, *Mississippi's Youth Court System*, 27 Miss. L.J. 133, 138 (1956).

[48] Miss. Code Ann. § 7185-06 (1956).

Although there have been various attempts by judges to adequately adapt their procedure to the underlying philosophy of child guidance and rehabilitation rather than criminal punishment,[49] the United States Supreme Court has determined that a juvenile court adjudication of delinquency must measure up to the essentials of due process and fair treatment.[50] Before *Gault* many state courts remained willing to write the Constitution out of juvenile proceedings although a modern trend in the direction of greater procedural protection had begun to be discernible.[51] The California courts had determined that they could not shut their eyes and ears to everyday contemporary happenings in their juvenile courts,[52] and New York in the Family Court Act of 1962 had determined that, on request, counsel must be appointed where juveniles and parents were unable to afford counsel.

The federal courts have, as is often the case, led the way in change. In *Kent v. United States*[53] where the juvenile court waived jurisdiction and the juvenile was indicted in district court, the Supreme Court said that "there is no place in our system of law for reaching a result of such tremendous consequence without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons. It is inconceivable that a court of justice dealing with adults, with respect to a similar issue, would proceed in this manner."[54] The federal court had earlier determined that juveniles had a right to counsel.[55] Although Mississippi has not gone this far, it has provided for allowing counsel[56] and advising minors and parents of rights thereto when a delinquent is subject to being deprived of his liberty.[57]

Professor John R. Bradley of the University of Mississippi School of Law made a timely statement in a recent *Mississippi Law Journal* article:[58]

> By design or not, it [*Long*] raises rather than answers questions. Does the juvenile have an absolute right to counsel in all juvenile proceedings? Will the state furnish counsel to an indigent juvenile . . . . [S]ometime soon the United States Supreme Court will probably have to answer the questions.[59]

Most observers that are familiar with the juvenile court movement were probably not too surprised by *Gault's* far-reaching rules, though they may have found it remarkable that such a decision had not come about

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[49] Note, *Juvenile Delinquents: The Police, State Courts and Individualized Justice*, 79 HARV. L. REV. 775, 807 (1966).

[50] Application of Gault, 87 S. Ct. 1428, 1445 (1967).

[51] Comment, *Criminal Offenders in the Juvenile Court: More Brickbats and Another Proposal*, 114 U. PA. L. REV. 1171, 1177 (1966).

[52] In re Contreres, 109 Cal. App. 2d 787, 789, 241 P.2d 631, 633 (1952).

[53] 383 U.S. 541 (1966).

[54] *Id.* at 554.

[55] Shioutaken v. District of Columbia, 236 F.2d 666, 670 (D.C. Cir. 1956).

[56] MISS. CODE ANN. § 7185-08 (1956).

[57] In re Long, 184 So. 2d 861, 862 (Miss. 1966).

[58] *See* Bradley, *1965-66 Mississippi Supreme Court Term—Some Significant Cases*, 38 MISS. L.J. 1, 15 (1966).

[59] Bradley, *1965-66 Mississippi Supreme Court Term—Some Significant Cases*, 38 MISS. L.J. 1, 15 (1966); Re Lon, 184 So. 2d 861 (Miss. 1966).

much sooner. Although all the implications of *Gault* may not be fully realized for some time, its principal rulings are not difficult to understand.[60] They may be divided into several main categories: (1) right to counsel,[61] (2) notice of charges,[62] (3) privilege against self-incrimination,[63] and (4) right of confrontation and cross-examination of witnesses.[64] In addition to these major issues the court also discussed the right to appellate review and to a transcript of proceedings.[65]

It is self-evident that the juvenile needs the assistance of counsel to cope with the intricate problems of law, to inquire into the facts, to insist upon proper procedure, and to prepare an adequate defense.[66] What was said in *Powell v. State of Alabama*[67] of the adult also applies to the child: he "requires the guiding hand of counsel at every step in the proceeding against him."[68] The right of counsel for juveniles, coming thirty-years after *Powell* and four years after *Gideon v. Wainwright*,[69] should have been of too great importance to ignore for this length of time. The President's Crime Commission recently recommended that to assure procedural justice for the juvenile it was of the essence that counsel be appointed as a matter of course whenever coercive action is possible.[70] The Children's Bureau of the United States Department of Health, Education, and Welfare has stated that:

> As a component part of a fair hearing required by due process guarantees under the 14th Amendment, notice of the right to counsel should be required at all hearings and counsel provided upon request when the family is financially unable to employ counsel.[71]

The Court in *Gault* said that a proceeding determining whether a child is a delinquent and therefore subject to loss of liberty is comparable to a felony prosecution and that the child required the guiding hand of counsel at every step. They held also that the aid of counsel was an essential element in the determination of delinquency.[72]

Undoubtedly many problems will be raised by the requirement of counsel in juvenile cases, but the need far outweighs any administrative difficulties that will arise. The method employed to provide counsel for adult defendants is one possible solution. The Mississippi Legislature has provided for appointment of counsel at the discretion of the trial

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[60] Lifstein, *In re Gault, Juvenile Court and Lawyers*, 53 A.B.A.J. 811 (1967).
[61] Application of Gault, 87 S. Ct. 1428, 1447 (1967).
[62] *Id.* at 1445.
[63] *Id.* at 1451.
[64] *Id.*
[65] *Id.* at 1459.
[66] *Id.* at 1448.
[67] 287 U.S. 45 (1932).
[68] *Id.* at 69.
[69] 372 U.S. 335 (1963).
[70] Application of Gault, 87 S. Ct. 1428, 1449 (1967).
[71] Standards for Juvenile and Family Courts, Children's Bureau Pub. No. 437-1966 (1966), p. 57; as cited in Application of Gault, 87 S. Ct. 1428, 1450 (1967).
[72] Application of Gault, 87 S. Ct. 1428, 1448 (1967).

judge for the indigent defendant in felony cases.[73] The case of *Conn v. State*[74] extended the scope of this statute by making the appointment compulsory. However, as was stated in *Gideon's Trumpet*,[75] the usual method of court appointment of attorneys leaves something to be desired.

> When advised that an indigent needs counsel, the judge usually picks out some lawyer who happens to be in the courtroom. . . . The lawyer then spends a few minutes with his new client at the side of the courtroom, or perhaps in an anteroom under the scrutiny of the bailiff or the marshal. In most of such assignments, after a few minutes of conference, the defendant is advised to plead guilty and he feels he has no choice but to do so . . . . This mock assignment of counsel and the cursory hurry-up job of a busy uncompensated lawyer makes a farce of due process of law and our Bill of Rights. Everyone who participates in the farce knows this—the judge, the district attorney, the assigned lawyer, the bailiff, and of course the defendant himself.[76]

It is especially important to approach the appointment of counsel for juveniles in a different manner because children of tender years and highly impressionable natures need a fair but understanding trial. Perhaps a combination of social workers and a court-appointed or volunteer attorney backed by a capable advisory staff composed of psychologists, counselors, and investigators can fulfill the immediate need.

In at least one-third of the states statutes now provide for the right to counsel, notice of the right, assignment of counsel, or a combination of these. In other states court rules have similar provisions. Mississippi has previously only required notice of counsel[77] to be provided at the defendant's own expense.[78] However, this was a step in the right direction, and the *Gault* ruling will come as no surprise to the Mississippi courts and the bar.

"[N]otice to comply with due process requirement must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunities to prepare will be afforded, and it must set forth the alleged misconduct with particularity."[79]

Due process of law requires notice that would be deemed constitutionally adequate in a civil or criminal proceeding. The child and his parents should be notified in writing of the specific charge to be considered; it should be given at the earliest practical time — sufficiently in advance of the hearing to permit adequate preparation.[80] Most state constitutions contain clauses comparable to the sixth amendment of the United States Constitution—that those accused of crime shall have the right to be informed of the charges against them. Some, however, have indicated that a minor brought before a juvenile court is not entitled to

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[73] *See* MISS. CODE ANN. § 2505 (Supp. 1966).

[74] Conn v. State, 251 Miss. 488, 170 So. 2d 20 (1964).

[75] A. LEWIS, GIDEON'S TRUMPET (1964).

[76] *Id.* at 199-200.

[77] In re Long, 184 So. 2d 861, 862 (Miss. 1966).

[78] MISS. CODE ANN. § 7185-08 (1956).

[79] Application of Gault, 87 S. Ct. 1428, 1446 (1967).

[80] *Id.*

this right on the theory that the youth was not charged with a crime. But the first essential of judicial fairness should be that the person charged should be given a clear understanding of the charges against him.[81] A child that is brought before a juvenile court is entitled as a constitutional right to a clear statement of the nature and causes of the proceedings against him. This is to enable him to prepare his defense. The child's parents or guardian must also have the right to obtain this statement because most children would be unable to comprehend the importance of these proceedings.[82]

The Mississippi Legislature has provided that notice to the parent is an indispensable prerequisite[83] to the jurisdiction of the court to hear and determine the case.[84] The Mississippi Youth Court Act clearly provides that the necessary petition must set forth the facts which bring the child before the court and the facts relied upon to support the charge of delinquency.[85] Thus Mississippi has already met the standard of notice.

Dealing with the question of the right against self-incrimination, Justice Douglas said in *Haley v. Ohio*,[86] where a fifteen-year-old had been tried for murder, that what transpired would make us pause for deliberate and careful inquiry if an adult had been involved. He said the child needs counsel and support and someone on whom to lean lest the overpowering presence of the law crush him. The boy was questioned hour after hour from midnight to dawn, and no one was there to make certain he did not become the victim of coercion. A fifteen-year-old lad questioned through the dead of night by police "is a ready victim of the inquisition."[87] The Court in *Gault* held that "the language of the Fifth Amendment, applicable to the states by operations of the Fourteenth Amendment, is unequivocal and without exception . . . [on this question]"[88] and that "the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults."[89]

This privilege should permit a child to remain silent when exposed to a fact-finding of delinquency by juvenile authorities, and should require that he be informed of this right before being questioned by the judge or any officer of the court. It is reasonable to assume that a child is incriminating himself when his responses expose him to incarceration through an adjudication of delinquency.[90] It was said in *In re Tahbel*,[91] where a California appellate court freed on habeas corpus a boy committed for refusing as a witness in juvenile court to answer certain questions upon advice of his counsel that

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[81] Antieau, *Constitutional Rights in Juvenile Courts*, 46 CORNELL L.Q. 387, 395 (1961).

[82] *Id.*

[83] Sharp v. State, 240 Miss. 629, 639, 127 So. 2d 865, 869 (1961).

[84] MISS. CODE ANN. § 7185-06 (1956).

[85] Sharp v. State, 240 Miss. 629, 636, 127 So. 2d 865, 868 (1961).

[86] 332 U.S. 596 (1948); Application of Gault, 87 S. Ct. 1428, 1453 (1967).

[87] Haley v. State of Ohio, 332 U.S. 596, 599 (1948).

[88] Application of Gault, 87 S. Ct. 1428, 1454 (1967).

[89] *Id.* at 1458

[90] Antieau, *Constitutional Rights in Juvenile Courts*, 46 CORNELL L.Q. 387, 408 (1961).

[91] 46 Cal. App. 755, 189 Pac. 804, 807 (1920).

> [I]t would have been strange, indeed, if the Legislature had sought to visit a minor with the loss of his natural parents' society, guidance and governance merely because, forsooth, he had the temerity to invoke the protection of a constitutional guaranty included in the state's organic law for the very purpose of safeguarding his personal liberty against the methods that obtained when confessions were extorted by inquisitorial abuses. . . . The liberty of a ward of the juvenile court . . . cannot be further restrained, as, for example, by confinement in a public institution, solely and simply because the ward chooses to stand steadfastly by a right guaranteed him by the fundamental law of the state.[92]

Section 7185-08 of the Mississippi Code provides (as is consistent for the majority of state courts in the United States) that "the hearing shall be conducted in an informal manner . . . without regard to the technicalities of other statutory procedures and rules of evidence. . . ."[93]

There is no doubt but that the juvenile should be allowed the right against self-incrimination. Perhaps there is a stronger argument for this protection for the juvenile than for the adult. Few children can resist the repeated questioning, badgering, and scare tactics all too familiar to our arrest and trial procedures. Surely here a juvenile has the right to become a *person* within the confines of constitutional protection. Clearly the Supreme Court was striking out at just such arbitrary proceedings.

Confrontation and cross-examination of witnesses is the fourth area of discussion. The *Gault* opinion states that "[a]bsent a valid confession adequate to support the determination of the Juvenile Court, confrontation and sworn testimony by witnesses available for cross-examination were essential for a finding of 'delinquency' and an order committing Gerald to a state institution for a maximum of six years."[94] Recommendations in the Children's Bureau Standards for Juvenile and Family Courts state that testimony should be under oath and only competent, material, and relevant evidence should be admitted.[95] It is inconceivable that juveniles can be incarcerated and decisions of such far-reaching effect made without "ceremony"[96] and basic procedural fair play.

Again section 7185-08 of the Mississippi Code providing for informal procedure in the hearing is applicable and is superseded by *Gault*.

Although the Supreme Court failed to rule on the right to appellate review[97] and to a transcript,[98] it seems likely that it will soon follow. In this area, as in many of those previously discussed, Mississippi has alertly and necessarily provided for both appeal[99] and transcript.[100]

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[92] In re Tahbel, 46 Cal. App. 755, 861, 189 Pac. 804, 807 (1920).

[93] MISS. CODE ANN. § 7185-08 (1956).

[94] Application of Gault, 87 S. Ct. 1428, 1459 (1967).

[95] *Id.*

[96] *See* Application of Gault, 87 S. Ct. 1428, 1459 (1967).

[97] *Id.* at 1459.

[98] *Id.*

[99] MISS. CODE ANN. § 7185-24 (1956).

[100] MISS. CODE ANN. § 7185-20 (1956).

The Court in *Gault* by no means decrees an end to juvenile courts,[101] and the observance of due process standards intelligently administered will not compel the various state courts to abandon any of the benefits of the juvenile process.[102] The beneficial features of juvenile courts will not be impaired by "constitutional domestication" because the practice of separate processing and treatment of juveniles from adults is in no way involved.[103]

Though it is not within the scope of this article to outline a model juvenile court system or attempt to devise a magic formula for adapting *Gault's* requirements into our system, it is imperative that the necessity of retaining the best of our present juvenile court functions — that of giving special attention and treatment to the juvenile — be emphasized in addition to the necessity of treating him as a person deserving a fair and impartial trial with all of the benefits and safeguards given to adults under our constitution.

Even though Mississippi has made great strides in the field of juvenile courts and does not have the juvenile delinquency problem found in large urban areas,[104] there is great need for the continuation and advancement of a successful and farsighted youth court system. Mississippi needs to seriously consider setting up a separate youth court system with a well-trained, qualified staff to administer to the juvenile and attempt to rehabilitate him in addition to providing an adequate adjudication fortified with all of the basic constitutional rights afforded adults.

Jimmie B. Reynolds, Jr.

Constitutional Law—State Aid to Mississippi Children Attending Private Schools

On July 15, 1964, the First Extraordinary Session of the Mississippi Legislature passed Senate Bill 1504. The preamble to this bill recites as follows:

> [T]he Legislature of Mississippi, mindful of the need for a literate and informed citizenry, and being desirous of advancing the cause of education generally, hereby declares that it is the policy of this state to encourage the education of all the children of Mississippi; . . . in futherance of this objective, and to afford each individual freedom in choosing public or private schooling, the Legislature of Mississippi finds that it is desirable and in the public interest that financial assistance should be provided from the public funds of the State for the education of the children in private schools. . . .[1]

Thus was born Chapter 27, 1964 First Extraordinary Session, of the Laws of the state of Mississippi, popularly known as the tuition grant

[101] Lefstein, *In re Gault, Juvenile Courts and Lawyers*, 53 A.B.A.J. 811, 812 (1967).

[102] Application of Gault, 87 S. Ct. 1428, 1440 (1967).

[103] *Id.* at 1441.

[104] Comment, *Mississippi's Youth Court System*, 27 Miss. L.J. 133, 141 (1956).

[1] Miss. Code Ann. § 6248-101 (Supp. 1966).

statute. By the terms of this law all children in Mississippi between the ages of six and twenty-one who are in a nonsectarian private elementary or high school are entitled to receive 185 dollars per academic year to assist in the cost of tuition.

As was to be expected, this statute soon came under legal attack. On February 21, 1966, twenty-three Holmes County Negroes, acting in behalf of themselves and their minor children, filed suit against the State Education Finance Commission in the federal court in Jackson, alleging that the law is in violation of the equal protection clause of the fourteenth amendment. On April 11, 1966, the United States, acting pursuant to section 902 of the Civil Rights Act of 1964,[2] intervened as a party plaintiff and joined the state of Mississippi as an added defendant. On May 6, 1966, several minor children receiving the grants were granted leave to intervene as defendant-intervenors. This case, styled *Coffey v. State Education Finance Commission*,[3] is still pending before a three-judge panel composed of Judges J. P. Coleman, Harold Cox, and Dan Russell.

The first purpose of this article is to examine the principal issues raised by this lawsuit and to discuss the merits of each issue in the light of prior federal decisions. The final section will be concerned with a proposed alternative to the tuition grant law.

Mississippi was not the only state to pass a law granting funds to children attending private schools, nor was the Mississippi law the first such statute to be attacked in federal court. Alabama, Arkansas, Louisiana, North Carolina, and Virginia all have in the past decade enacted at least one private school tuition bill, and each one of these bills has undergone constitutional challenge in federal court.

The majority of these bills differ markedly from the Mississippi legislation; consequently, the litigation concerning them should have little or no effect on the pending Mississippi case. The Arkansas statutes[4]—passed during the Little Rock crisis—allowed a public school to be closed and its building subsequently leased to private authorities who would operate a school in that building with the aid of state funds. This legislation was struck down as unconstitutional in *Aaron v. McKinley*,[5] where the court said that the reasons for and the results of the Arkansas legislation "are too obvious to require further discussion."[6]

The state of Alabama has twice passed tuition grant legislation. The first tuition law[7] was considered by the court in *Lee v. Macon County Board of Education*.[8] This law provided for the closing of any public school by the local school board when the operation of that school was "not in the public interest[9] and for the payment of private school tuition grants to children of any area in which public schools

[2] 42 U.S.C. § 2000h-2 (1958).

[3] C.A. #3906 (three-judge court, S.D. Miss., filed Feb. 21, 1966).

[4] Acts #4 and #5, 2d Extraordinary Session, 61st General Assembly (1958), as amended by Act #51, Ark. Acts of 1959.

[5] 173 F. Supp. 944 (E.D. Ark. 1959), *aff'd per curiam sub nom* Faubus v. Aaron, 361 U.S. 197 (1959).

[6] *Id.* at 952.

[7] ALA. CODE tit. 52, §§ 61 (19-19) and 61 (20-21) (1961).

[8] 231 F. Supp. 743 (M.D. Ala. 1964).

[9] ALA. CODE tit. 52, § 61 (13) (Cum. Supp. 1965).

were unavailable. The court found that public schools had become "unavailable" in Macon County when the State Board of Education closed Tuskegee High School after a semester-long boycott by white students—a boycott which had been "encouraged and made possible by the conduct of the State of Alabama acting through its officials and agents."[10] Consequently, the court enjoined the enforcement of the statute.

After this 1964 decision the state of Alabama amended its tuition grant law to make the payments no longer dependent on the unavailability of public schools in the area. Eligibility for the state grant then depended, rather, on the parent's decision that "the child's attendance in the [public] school to which he is assigned will be detrimental to the physical or emotional health of the child. . . ."[11] In finding the act unconstitutional the court noted that the only rational basis for this peculiar sounding eligibility requirement was that it was just another one of the state's continuous efforts to nullify the effect of the *Brown v. Board of Education*[12] decision.[13]

The North Carolina tuition law[14] made the grants available only to children assigned to integrated public schools. It was declared unconstitutional in *Hawkins v. North Carolina Board of Education.*[15]

In *Hall v. St. Helena Parish School Board*[16] the court threw out Louisiana legislation[18] which tied in the state grants to the closing of a public school in a particular parish and further provided for extensive state management of the "private" schools.

A reading of the Mississippi tuition grant statute demonstrates that the constitutional objections raised in the foregoing cases do not apply to the Mississippi law. All of the bills in one way or another restricted the eligibility of grant recipients to those children threatened with integration. North Carolina did so openly; Arkansas, Louisiana, and Alabama did so more subtly; but the court in each case recognized the purpose and effect of the particular requirement.

The Mississippi law, however, has no such restriction. The opening section of the law states that "*every* child . . . who is in attendance or who shall hereafter be in attendance at a private school . . . shall be eligible . . . to . . . State financial assistance. . . ."[18] (emphasis added). Furthermore, there is a section in the Mississippi law which specifically forbids the type of activity in support of the private schools which the *Lee* court found the Alabama public officials to have been engaged in. The pertinent section reads:

> It shall be unlawful for any official of the State of Mississippi, or of any subdivision thereof, to influence, or attempt to influence, any child, or the parent or guardian of any child, in the selection of the type of school, public or private, which the

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[10] 231 F. Supp. 743, 751 (M.D. Ala. 1964).

[11] ALA. CODE tit. 52, § 61(8) (Cum. Supp. 1965).

[12] 347 U.S. 483 (1954); *rehearing* on question of relief, 349 U.S. 294 (1955).

[13] Lee v. Macon County Bd. of Educ., 267 F. Supp. 458 (M.D. Ala. 1967).

[14] N.C. GEN. STAT. § 117-275 (Replacement 1966).

[15] C.A. #2067 (Three-judge court, W.D.N.C. 1966).

[16] 197 F. Supp. 649 (E.D. Ala. 1961), *aff'd per curiam* 368 U.S. 515 (1962).

[17] LA. REV. STAT. §§ 17:350.1 through 17:350.14 (1963).

[18] MISS. CODE ANN. § 6248-101 (Supp. 1966)

> child chooses to attend. A violation of this section shall constitute a misdemeanor and, upon conviction thereof, shall be punished by a fine not to exceed Five Hundred Dollars ($500.00), not more than six (6) months in jail, or both.[19]

There are two cases which do bear heavily on the issues presented in *Coffey*. One of these is *Griffin v. State Board of Education*,[20] which upheld the Virginia tuition law.[21] The other is the very recent Louisiana decision, *Poindexter v. Louisiana Financial Assistance Commission*,[22] which is at least partially in conflict with *Griffin*.

The *Griffin* case was decided in March of 1965. At issue was the constitutionality of the tuition grant act after which the Mississippi law is patterned. Like its Mississippi counterpart the Virginia statute makes state aid available to *any* child between the ages of six and twenty-one who has not graduated from high school and who is enrolled in a nonsectarian private school. Except for the power to prescribe minimum academic standards for a school attended by children receiving the grants, the state of Virginia is given no power to control the operation of the private school.

In upholding the statute on its face, the three-judge panel stated:

> The plan is an open, unmasked appropriation and disbursement of public moneys for a legitimate purpose, without reference to race.
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> . . . .
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> . . . In sum, the Virginia law of tuition grants is, in our judgment, an unexceptional program when indiscriminately administered.[23]

The court, however, realized that the program could be administered in a discriminatory fashion. To meet this problem, it devised the following test:

> Payment of a tuition grant for use in a private school is legal if it does not tend in a determinative degree to perpetuate segregation. The test is not the policy of the school, but the measure in which the grant or grants contribute to effect the exclusion on account of race.
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> . . . .
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> . . . [I]f the private school is the creature of, or is preponderantly maintanied by, the grants, then the operation of the school is state action, and payment of the grants therefore is a circumvention of the equal protection clause of the Constitution.[24]

In accordance with this above-quoted "preponderance" test, the court issued its final order restraining and enjoining the state of Virginia only

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[19] MISS. CODE ANN. § 6248-107 (Supp. 1966).

[20] 239 F. Supp. 560 (E.D. Va. 1965).

[21] VA. CODE ANN. §§ 22-115.29 through 22-115.35 (1964).

[22] 258 F. Supp. 158 (E.D. La. 1967).

[23] Griffin v. State Bd. of Educ., 239 F. Supp. 560, 564 (E.D. Va. 1965).

[24] *Id.* at 565.

from making payment of the grants for use in any school "predominantly maintained by such tuition grants."[25]

The *Poindexter* decision in Louisiana, filed on August 28, 1967, struck down the latest Louisiana tuition law.[26] This Louisiana law was quite similar to the Virginia law approved in *Griffin* in that it provided for grants to all children of a certain age attending nonsectarian private elementary or secondary schools, and in that it allowed only a minimal amount of state supervision of the schools.[27] In striking down this law the Louisiana court is nominally in conflict with the Virginia tribunal. In its opinion the *Poindexter* court rejects the Virginia preponderance test:

> With deference, we disagree with the criterion the Court applied in *Griffin*. The payment of public funds in any amount . . . is undeniably state action. The question is whether such action in aid of private discrimination violates the equal protection clause. . . . The criterion is whether the state is so significantly involved in the private discrimination as to render the state action . . . violative of the equal protection clause.[28]

Examining the *Poindexter* and *Griffin* opinions more closely, however, one may discern that the difference between the two is perhaps more apparent than real. In *Griffin* the court recognized that the Virginia tuition law was not a scheme concocted to preserve segregation by stating that "Our discussion commences with the tuition grant plan as reconstructed and existing in 1960. By then the so-called 'massive resistance' had been abandoned and the 'freedom of choice' program begun."[29]

The principal thrust of *Poindexter,* on the other hand, was that the Louisiana law was just another in a long series of unsuccessful attempts by the Louisiana legislature to circumvent the effect of the *Brown* decision of 1954. Eleven full pages of the court's opinion are devoted to an historical survey of the state's past attempts to enforce segregation. Into this survey the contested tuition grant act is neatly fitted:

> Thus, for a hundred years, the Louisiana legislature has not deviated from its objective of maintaining segregated schools for white children. Ten years after *Brown*, declared policy became undeclared policy. Open legislative defiance of desegregation orders shifted to subtle forms of circumvention. . . . But the changes in means reflect no change in legislative ends.[30]

It was with this concept of the Louisiana law in mind, then, that the *Poindexter* court devised its standard for the amount of state involve-

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[25] *Id.* at 566.

[26] La. Rev. Stat. §§ 17:2951 through 17:2959 (1963).

[27] The Louisiana Financial Assistance Commission on occasion inspected the insittutions attended by the children receiving the grants to determine whether they were bona fide schools and whether the children were in actual attendance there.

[28] Poindexter v. Louisiana Financial Assistance Comm'n, 258 F. Supp. 158 (E.D. La. 1967).

[29] Griffin v. State Bd. of Educ., 239 F. Supp. 560, 562 (E.D. Va. 1965).

[30] Poindexter v. Louisiana Financial Assistance Comm'n, 258 F. Supp. 158 (E.D. La. 1967).

ment required if that involvement is to be held "significant" and thus unconstitutional. In articulating this standard the court said that "[a]ny aid to segregated schools that is the product of the State's affirmative, purposeful policy of fostering segregated schools and has the effect of encouraging discrimination is significant state involvement in private discrimination."[31]

Thus one can see that the "preponderance" test of *Griffin* and the "significant involvement" test of *Poindexter* do not necessarily conflict. Accepting the finding of fact of the Virginia court — that the Virginia plan was not a pro-segregation measure — the *Poindexter* court, although specifically disagreeing with the *Griffin* test, would under its own rule have to uphold the Virginia tuition grant law.

It is thereby apparent that a formula for judging the constitutionality of such legislation may be propounded which encompasses the tests of both *Griffin* and *Poindexter*. If a court finds that a tuition law is part of a state's policy of maintaining segregation, it could summarily invalidate it. If the court did not find such legislative intent, then it could apply the *Griffin* preponderance test to each school affected by the legislation. In other words, the first question for the court to decide concerns legislative intent. Is the bill just another segregationists' ploy, or did the legislature have something else in mind? In a brief filed by the plaintiff-intervenor United States in the *Coffey* case, the government attempts to show by an historical outline of prior actions of the state of Mississippi that the contested tuition bill is such a ploy. The defendants in their brief, however, argued powerfully to the contrary:

> It is also true that in the several years immediately following the decisions in *Brown*, the Mississippi Legislature adopted a series of statutes which can be likened to the "massive resistance" program of the Virginia General Assembly. But just as Virginia had to abandon its program of "massive resistance," so, too, did Mississippi, years prior to the adoption of our tuition grant statutes, have to abandon its resistance to *Brown*. By 1964, every intelligent person in Mississippi knew that the public schools of the state had to be desegregated, that there was no escape from what was then an inexorable fact of life.[32]

The defendants bolstered this contention by stating that "not since the James Meredith affair has the authority of the state . . . been used in opposition to desegregation,"[33] and pointing out that in the most recent desegregation troubles—the Grenada school incidents of September 1966—the police power of the state was actually used to *enforce* the mixing of the races.[34]

According to the defendants, the actual concern of the legislature was simply to provide for the educational needs of the state's children. The legislature had reason to believe that a substantial number of families would enroll their children in non-public schools because of the

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[31] *Id.*

[32] Brief for defendants at 76-77, *Coffey v. State Educ. Fin. Comm'n*, C.A. #3906 (Three-judge court, S.D. Miss., filed Feb. 21, 1966).

[33] *Id.* at 77.

[34] *Id.*

unfavorable public school conditions that the parents believed were likely to develop as a result of the sudden, state-wide desegregation that was going on. Defendants further argued that regardless of whether or not some or all of the legislators approved or disapproved of the exodus, it was simply a fact of life. The brief states:

> There was nothing that could be done about the cause which would bring about that result. But it did appear . . . that it was absolutely necessary for the state to do something about its effect, for no state, in this day and time, can afford an uneducated, or a poorly educated, citizenry.[35]

After deciding the question of intent, the court may then turn to the issue of the effect of the state aid. In the Mississippi case the former question is closely related to the latter. It is the contention of the plaintiffs that the effect of the Mississippi tuition grant statute has been to promote and facilitate the movement of children to private schools. The defendants contend that the grants have had little or nothing to do with the exodus; the children had left or were going to leave anyway.

If the court agrees with the defendants on either the intent or the effect issue, then the Mississippi tuition grant statute should be upheld on its face. Yet, as was indicated earlier, such a ruling may not be the final disposition of the case. The court could still very well decide to invoke the *Griffin* test for each particular private, segregated school to determine whether or not that institution is being maintained by a "preponderance" of state funds.[36]

If the court does invoke the *Griffin* test and if the statistics provided in the United States' brief are correct,[37] several of the approximately thirty-five private, nonsectarian schools in Mississippi could continue to receive public funds[38] in the amounts they now receive

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[35] *Id.* at 90.

[36] In this respect it is important to note that apparently only operating and maintenance expenses are involved in the *Griffin v. State Board of Education*, 239 F. Supp. 560 (E.D. Va. 1965) preponderance test. *Griffin* at 565 speaks only of the contributions to the "running of the school" and to "maintenance and operation." Thus the cost to the school of its own building would not be considered in computing the percentage of state aid to the institution, but the rent paid by a school for the use of a building owned by some other party could be included as part of the school's operating expense.

[37] Table III on page 36 of the brief filed by the United States in *Coffey v. State Educational Finance Commission*, C.A. #3906 (Three-judge court, S.D. Miss., filed Feb. 21, 1966), lists the twenty-four private schools receiving the grants during the 1965-1966 school year and gives the percentage of total cash and non-cash expenditures met by the state funds of each school. Of these twenty-four, five are listed as receiving over fifty percent of their expenditures from the state. These figures are, however, obviously out of date. Over a dozen new schools have since then begun receiving the grants, and no percentage figures have been compiled for the 1966-1967 school year or for the current 1967-1968 school year.

[38] It is one contention of the defendants in *Coffey v. State Educational Finance Commission*, C.A. #3906 (Three-judge court, S.D. Miss., filed Feb. 21, 1966), that it is not the schools themselves, but the children, who are receiving the state money. The court, however, is likely to reject this contention. This issue is discussed later in the note.

them. It does not follow, however, that this fact need put a stop to all state aid. The federal court could decide to issue a final order in the *Coffey* case similar to the general type order issued by the *Griffin* court. Such an order would specify no particular school to which funds would be denied, but it would, rather, place the burden of applying the test on the State Educational Finance Commission. Thus if not specifically excluded from the grant-in-aid program, a presently nonconforming school could raise the cost of its tuition and the amount of its budget enough to pass the preponderance test, or the state itself could take action to limit the amount of money that one school could receive.

In summary, it should be made clear that the court in *Coffey* has several avenues open to it. It could accept the *Griffin* rule at face value and apply it to the individual schools; it could employ the *Poindexter* decision exclusively, and thereby base its decision entirely on the issues of legislative intent and practical effect; or—as this writer suggests—it could subject the Mississippi law to a combined test based on the formulae employed in both *Griffin* and *Poindexter*. Under any of these three methods the Mississippi tuition grant statute stands a reasonable chance of being upheld.

If, however, the grant-in-aid statute is declared to be a violation of the equal protection clause, this action would not necessarily mean the absolute end of all aid to private schools. Another idea for state aid has been advanced which may fall within the bounds of constitutionality: a state-financed revolving loan fund for children attending primary and secondary private schools. This plan, if enacted, could include a section removing disabilities of minority for the recipients of the loans, thereby enabling the state to make the loan directly to the child rather than encumbering the parent with the debt. The loans themselves could be made repayable over an extended period of time with interest not accruing until the recipient has had time to complete his formal education. Naturally any loan program will be of less benefit to a child than would the present direct grant system, but without the latter form of state aid, the loan fund would be of substantial benefit.

There are several reasons for believing that a state loan fund would not be disallowed by the federal courts. In the first place, there is ample precedent in both Mississippi and federal law for this type of program. Section 9054-06 of the Mississippi Code of 1942 authorizes the State Medical Education Board to make loans not to exceed five thousand dollars to a student "to defray his or her tuition or other expenses in any reputable . . . medical college or school in the United States. . . ."[39] By the terms of this act the loans are repayable in full to the state at four percent interest, with the payment to begin "one year from the date the applicant completes his internship."[40] It is interesting to note that this loan may be repaid and not only in cash, but also

> may be repaid to the state of Mississippi in services to be rendered by the applicant by practicing his profession at some place within the state of Mississippi to be approved by the board. One-fifth of the loan or scholarship, together with the

[39] MISS. CODE ANN. § 9054-06 (1942).

[40] *Id.*

> interest thereon, to be credited to the applicant for each year of practicing his profession. . . .[41]

Section 9054-06 also removes the disability of minority for all medical students who are granted these loans.

On the federal level an educational loan fund was created by the National Defense Education Act of 1958.[42] This act directs the Commissioner of Education to establish student loan funds at participating colleges and universities, as well as non-profit elementary and secondary schools, to be financed chiefly by federal contributions and to a lesser extent by local funds. Loans are made available in amounts of up to one thousand dollars a year for a maximum of five years and are generally repayable over a ten-year period starting one year from the date the recipient leaves college. Interest accrues on the loan at the rate of three percent per annum, beginning on the date that the first repayment is due. The NDEA provides for an alternative repayment plan similar to the Mississippi law. If a recipient becomes a full-time teacher, the amount of his note plus the interest due thereon will be reduced by ten percent per academic year of service, up to a maximum of fifty percent of the debt.

Another factor which tends to place the proposed loan fund program on firm constitutional ground is that this program seems to be more similar to the New Jersey program of free bussing for children in parochial schools declared constitutional in *Everson v. Board of Education*[43] and the Louisiana free textbook law upheld in *Cochran v. Louisiana State Board of Education*[44] than does the present Mississippi grant-in-aid program. In both *Everson* and *Cochran* the Supreme Court of the United States held that it was the school children and not the private schools themselves which benefitted from the state aid.

In *Poindexter* the court distinguished the Louisiana tuition grant law from the free bussing and free textbooks programs saying in its opinion that "the private schools established in Louisiana are direct beneficiaries of the grants-in-aid; the children or parents are conduits to the schools."[45] The *Griffin* court had made substantially the same finding in its examination of the Virginia tuition law.[46] It seems clear that under the proposed loan fund the children receiving the loans could not be said to be a "conduit" to the private schools. The transaction would be a business proposition taking place entirely between the state and the loan applicant. Furthermore, the child—not the school—is under the legal obligation to repay the loan.

Perhaps the most important factor in favor of the contemplated loan fund's constitutionality concerns one of the chief points in the *Poindexter* decision and a proposition that the court in the pending *Coffey* case would presumably have to find were it to strike down the Mississippi tuition grant statute. This vital point is that although the state grant program may be innocuous on its face, it nevertheless has had the effect

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[41] *Id.*

[42] 20 U.S.C.A. §§ 424-25, 445 (1964).

[43] 330 U.S. 1 (1947).

[44] 281 U.S. 370 (1930).

[45] Poindexter v. Louisiana Fin. Comm'n, 258 F. Supp. 158 (E.D. La. 1967).

[46] Griffin v. State Bd. of Educ., 239 F. Supp. 560, 563 (1965).

of causing the school children to leave the integrated public schools. The contention is, in effect, that the private schools would collapse and wither away without the state aid to their students. Suppose, however, that the grant program were disallowed and the affected parents—or many of them—simply tightened their belts and continued to send their children to the private schools. This occurrence would demolish a vital point in the argument of the government. Then the state, acting under the legitimate public policy consideration of providing for an educated citizenry, presumably would be free to step in and set up such a loan fund.

Futhermore—following this same line of thought—since Mississippi has had a long-standing public policy of encouraging our educated youth to remain in the state, there would seem to be no constitutional objection if the legislature in its discretion were to provide an alternative form of repayment of these loans similar to that which was provided for under section 9054-06 of the Mississippi Code and the NDEA. Were the legislature to enact such a provision, a loan recipient could pay back the principal and interest in cash, or he could pay back the loan by services rendered in remaining and working in Mississippi for a certain number of years.

In conclusion it may be said that the future of state aid to children attending private schools is at the present quite hazy but by no means dark or bleak. In deciding *Coffey v. State Educational Finance Commission*[47] the federal court may well uphold the direct grant program now being used in the state. But even if this law is struck down, the legislature is in no way precluded from other action to assist these children. A loan fund, for the reasons outlined above, could likely pass any test of constitutionality and at the same time materially alleviate the heavy financial burden resting on parents who have decided that their children must be educated in a private school.

Don Barrett

Evidence—Blood Tests as Evidence and the Privilege against Self-Incrimination

The Supreme Court in *Schmerber* v. *California*[1] upheld the conviction of a defendant for driving while intoxicated. The Court refused to accept the defendant's argument that the admission into evidence of a blood test violated his privilege against self-incrimination. Reaction to the decision was either surprise or confusion or both. The reaction was precipitated by the publicity given the *Miranda v. Arizona*[2] and *Escobedo v. Illinois*[3] decisions in which the rules governing the exclusion of confessions were substantially broadened. Apparently, it was believed that *Miranda* and *Escobedo* had broadened by implication to privilege against self-incrimination to include protection of an accused from physical examination.

[47] C.A. #3906 (Three-judge court, S.D. Miss., filed Feb. 21, 1966).

[1] 384 U.S. 757 (1966).
[2] 384 U.S. 436 (1966).
[3] 378 U.S. 478 (1964).

The *Schmerber* case grew out of the arrest of the defendant at a hospital while he was receiving treatment for injuries sustained in an automobile accident. Acting upon the advice of counsel, the defendant objected to a police officer's directing an attending physician to withdraw a blood sample from the defendant's body. In spite of the defendant's objection the blood sample was withdrawn. A chemical analysis of the blood sample indicated the defendant was intoxicated. The defendant was charged with driving while intoxicated, and the analysis of the blood test was admitted as evidence at his trial. Having been convicted, the defendant appealed on the grounds that the admission of the blood test violated his privilege against self-incrimination guaranteed by the fourth amendment; and denied him due process of law as guaranteed by the fourteenth amendment.

The Court rejected each argument. The privilege against self-incrimination, said the Court, protects an accused only from being compelled to testify or to provide other evidence of a "testimonial or communicative nature."[4] In the opinion of the Court the withdrawal of the blood and the use of the analysis did not involve this type of compulsion. The Court rejected the defendant's argument that he was unreasonably searched and said that once it is assumed that the fifth amendment does not prohibit the taking of blood samples, the question whether the fourth amendment guarantee against unreasonable searches and seizures has been violated depends upon the circumstances and the manner in which the sample has been taken. The Court held that "the officer might reasonably have believed he was confronted with an emergency, in which a delay . . . threatened 'the destruction of evidence. . . .'"[5] In such a situation the failure to obtain a search warrant is justified. In addition the Court stated that it was satisfied that both the manner in which the blood was withdrawn and the test used to measure the alcohol level were reasonable.[6]

The Court relied upon *Breithaupt v. Abram*[7] to reject the defendant's argument that he had been denied due process of law. In that decision the Court had upheld the admission into evidence of a blood sample withdrawn from an unconscious suspect. Furthermore, the Court distinguished the *Schmerber* case from *Rochin v. California*,[8] where evidence had been obtained by pumping the suspect's stomach. Rochin's conviction was overturned on the ground that the brutal method used to obtain the evidence was a denial of due process. But here the Court pointed out that there was an absence of any brutality—the blood test was performed in a hospital by a physician; thus the defendant was not denied due process of law.

The heart of the *Schmerber* decision is the distinction drawn by the Court between physical or real evidence and testimonial or communicative evidence. The distinction is not a new development. In 1910 Mr. Justice Holmes said in *Holt v. United States*[9] that

> the prohibition of compelling a man in a criminal court to be a

[4] Schmerber v. California, 384 U.S. 757, 761 (1966).

[5] *Id.* at 770, citing Preston v. United States, 376 U.S. 364 (1964).

[6] *Id.* at 771.

[7] 352 U.S. 432 (1957).

[8] 342 U.S. 165 (1952).

[9] 218 U.S. 245 (1910).

> witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material.[10]

The Court in *McFarland v. United States*[11] relied on the above quote in holding that evidence of the presence of blood on the defendant's body was admissible as evidence. Thus it is evident from a reading of both the cases[12] and the text writers[13] that the privileges against self-incrimination is limited to testimonial disclosures.

Although the *Schmerber* decision may have caused some misunderstanding, it should quiet some of the fears raised by *Miranda* and *Escobedo* concerning the scope of the privilege. In *Miranda* the Court stated that the privilege against self-incrimination is "as broad as the mischief against which it seeks to guard."[14] But the Court noted that "the privilege is fulfilled . . . when the person is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will."[15]

On the other hand *Schmerber* leaves unanswered several questions concerning the issue of due process of law. As noted previously the Court relied on *Breithaupt v. Abram* in rejecting Schmerber's claim that he was denied due process of law. In *Breithaupt* the defendant claimed he was denied due process of law because a blood sample was withdrawn from his body while he was unconscious. Mr. Justice Clark, speaking for the majority, said that

> the absence of conscious consent, without more, does not necessarily render the taking [of a blood sample] a violation of a constitutional right; and certainly the test as administered here would not be considered offensive by even the most delicate.[16]

Justice Clark added, "Furthermore, due process is . . . measured . . . by the whole community sense of decency and fairness."[17]

Chief Justice Warren's dissent questioned the implication of Justice Clark's statement that a different result might have followed had the defendant been conscious and objected to the blood test. The Chief Justice emphatically stated, "I cannot accept an analysis that would make physical resistance by a prisoner a prerequisite to the existence of his constitutional rights."[18]

The analysis which the Chief Justice felt the majority's opinion laid down presents an interesting question: Is a defendant denied due proc-

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[10] *Id.* at 252-53.

[11] 150 F.2d 593 (D.C. Cir. 1945).

[12] Holt v. United States, 218 U.S. 245 (1910); McFarland v. United States, 150 F.2d 593 (D.C. Cir. 1945).

[13] 8 WIGMORE, EVIDENCE §§ 2263-66 (McNaughton rev. 1961); MCCORMICK, EVIDENCE § 126 (1954).

[14] Miranda v. Arizona, 384 U.S. 436, 460 (1966), citing Counselman v. Hitchcock, 142 U.S. 547, 562 (1892).

[15] 384 U.S. at 460, citing Malloy v. Hogan, 378 U.S. 1, 8 (1964).

[16] 352 U.S. 432, 435-36 (1957) (footnote omitted).

[17] *Id.* at 436.

[18] *Id.* at 441.

ess of law when his physical resistance to an examination is overcome by force?

The answer is partially given by cases[19] arising in California. The California Supreme Court in these cases held that evidence produced as a result of a physical examination of the accused did not violate the accused's constitutional guarantee against self-incrimination. In these cases the accused objected to submission to blood tests conducted by the police.[20] However, in none of these cases is it stated that the accused *physically resisted* the examination. These cases must be viewed, then, as recognition by the California Supreme Court of the rule laid down in *Holt* and *McFarland.*

On the other hand there are two prominent cases in which convictions were reversed because of the methods used to obtain evidence. The better known of the two cases is *Rochin v. California.*[21] In that case the accused put two pills in his mouth while in the presence of police officers. The efforts of the police to extract the pills failed. The accused was then taken to a hospital where his stomach was pumped and the pills retrieved. An analysis of the pills revealing that they were narcotics was introduced as evidence at his trial. This evidence was instrumental in securing a conviction. The defendant appealed, and his conviction was reversed. Justice Frankfurter, speaking for the majority, stated that the conduct of the police shocked the conscience and offended even hardened sensibilities. Frankfurter added that it was pointless in this case to distinguish real evidence from verbal evidence. He noted the reason for excluding coerced confessions is the same as that for excluding real evidence secured in the same manner—it offends the community's sense of fair play and thus is a denial of due process of law.

In a similar case, *United States v. Townsend,*[22] the defendant, who was charged with taking indecent liberties with a minor, was informed that scientific tests would be conducted to determine whether blood was present on his sex organs. The defendant refused to submit to the test and insisted on his right to consult an attorney. He was not allowed to contact an attorney, and when he physically resisted the test, his resistance was overcome by force and the tests were administered. The tests disclosed the presence of blood, and he was apparently convicted on the basis of that evidence. The District of Columbia District Court expressed doubt as to the probative value of the evidence but reversed the conviction because of the methods used to obtain the evidence. In reversing the defendant's conviction, the court rejected the government's reliance on the statement in *McFarland* that "out of court, as well as in court, his [i.e. defendant's] body may be examined with or without his consent."[23] In rejecting the government's argument the court said, "*McFarland* [does not] state that force may be used to compel disclosure of physical evidence."[24]

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[19] *E.g.*, People v. Haeussler, 41 Cal. 2d 252, 260 P.2d 8 (1953).

[20] People v. Haeussler, 41 Cal. 2d 252, 260 P.2d 8 (1953); People v. Henry, 23 Cal. App. 2d 155, 72 P.2d 915 (1937).

[21] 342 U.S. 165 (1952).

[22] 151 F. Supp. 378 (D.D.C. 1957).

[23] *Id.* at 383.

[24] *Id.*

The scope of the privilege against self-incrimination, then, is not as narrow as one text writer suggests. Harvard's Russell Weintraub has said that

> the privilege may apply to any compelled conduct which the accused "can so control as to use it as a means of conveying ideas." Conduct which the accused cannot so control does not, no matter how or when compelled violate the privilege.[25]

But contrary to what Mr. Weintraub suggests, the scope of the privilege does extend to *how* the evidence is compelled. The methods used to obtain the evidence must not be so brutal as to violate the accused's right to due process of law, as the *Rochin* and *Townsend* cases point out.

As to the question whether force may be used to compel an accused to submit to an examination, the answer *Townsend* suggests is *no*. But if *no* is the answer, it appears that Chief Justice Warren was correct in his analysis of the majority's opinion in *Breithaupt* which implied the physical resistance is a prerequisite to the existence of a constitutional right. Before Warren's analysis is accepted, it should be noted that in the *Townsend* case the court probably would have reversed the decision solely on the grounds that the evidence lacked probative value. Also, the *Rochin* conviction was reversed because of Justice Frankfurter's concept of due process of law. Even though the stomach pump was the only effective method of obtaining the evidence, Justice Frankfurter objected to the brutality of the method. Thus, neither the *Rochin* nor *Townsend* case provides a conclusive answer to the question.

There are three analyses which may be applied to the cases discussed: (1) Chief Justice Warren's analysis of the majority position in *Breithaupt* was correct—physical resistance is a prerequisite to a constitutional right; (2) while the scope of the privilege against self-incrimination is generally limited to testimonial disclosures, the scope is broadened by the due process guarantee to include protection from brutal methods of search; or (3) blood tests are admissible in any case, provided they are administered in a manner similar to that used in *Schmerber*, and the admissibility of evidence obtained by other types of physical examination will depend on the circumstances, i.e. the type of evidence sought, its relevance to the issues, and the methods by which the evidence can be obtained.

The courts seem to be guided by a combination of the two latter analyses. An accused cannot validly claim a denial of due process of law when his resistance is countered by force in order to take a blood sample. However, if force is applied to influence an accused to submit to another type of physical examination, the accused stands a better chance of having his claim of denial of due process sustained by the courts.

It is obvious from the discussion of these cases that the privilege against self-incrimination cannot be viewed solely in relation to the type of evidence sought to be introduced. The privilege must also be viewed in relation to the due process clause if the subject is to be brought into

[25] Weintraub, *Voice Identification, Writing Exemplars and the Privilege Against Self-Incrimination*, 10 VAND. L. REV. 485, 506-07 (1957).

focus. While the effect of the *Miranda* and *Escobedo* decisions may be to replace the back-room of the police station with a medical laboratory, the due process clause will determine the degree to which the tools of the laboratory may be used to obtain evidence.

Eugene M. Bogen

Indigent Defendants—The Need for Effective Aid in Addition to Counsel

I. Introduction

Our common law history is ingrained with the concept that all men, rich or poor, should have the same opportunity for justice; that an individual's station in life should not determine the degree of justice he will receive in the courtroom. From the Magna Carta to the fourteenth amendment this concept has been written into our judicial system. The Magna Carta states: "To no one will We sell, to none will We deny or delay, right or justice."[1] This thought is continued in the language of the fourteenth amendment: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person . . . the equal protection of the laws."[2] Our religious heritage contains references to equal justice for rich or poor, friend or stranger.[3] In spite of all these principles, the words "Equal Justice Under Law,"[4] which often adorn the buildings housing our courtrooms, have had little meaning for those without the means to pay for an interpretation.

Although equality before the law should be the basic principle of our democracy, a basic defect in our judicial system is exposed when the state or the wealthy, in effect, can purchase justice by being financially able to prepare and prosecute a case while the less fortunate members of society cannot. Where such conditions are allowed, equality before the law depends on the individual's financial condition. The advantage in any trial will necessarily lie with that party who can afford to use his economic might to obtain evidence denied to his opponent solely because of a lack of funds. Certainly such circumstances exist where the state uses its wealth to prosecute the "indigent defendant"[5] in a criminal trial.

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[1] Chapter 40 of the Magna Carta cited by Y. Komisar, F. Inbau, and T. Arnold, Criminal Justice In Our Time 4 (1965).

[2] U.S. Const. amend XIV, § 1.

[3] "Ye shall have one manner of law, as well for the stranger as for one of your own country." *Leviticus* 24:22.

[4] Found on the building which houses the Supreme Court of the United States. Simeone and Richardson, 8 St. Louis U. L. J. 15 (1963).

[5] A very broad definition is given to the term *indigent defendant*. It is essential for a fair administration of justice that the determination of who is indigent for criminal trials remain variable. The standard used for determining indigency here is as follows: An indigent is any person charged with a crime who cannot afford any essential aspect of an adequate or effective defense even though he may be able to pay for part of his defense. Absolute poverty is not required to fall within the definition of indigency given here. For the problems of defining who is an indigent *see* The President's Commission on Law Enforcement And Administration of Justice, Task Force Reports: The Courts 61 (1967); National Conference on Law and Poverty 119-126 (1965).

Our judicial system is based upon the adversary process. It is through the adversary system of trial that our goal of equality before the law is sought to be fulfilled. Such a system is used because it is thought to be the most effective means of determining the truth. Truth should emerge from the struggle between two parties presenting their case before an impartial tribunal. Each participant is free to discover and present that evidence he believes will support his case and be detrimental to his opponent. The adversary system presupposes, however, that truth only emerges where the "parties are roughly comparable in legal, investigative, and expert resources. The system will not function well if they are not. . . . [S]ubstantial equality is certainly a minimal condition in a procedural system oriented towards a fair trial."[6] Where one side in the contest is substantially stronger than the other, truth certainly cannot emerge, and the result will be the answer imposed by economic power. As the quotations from the Magna Carta and the Constitution illustrate, we claim that equality before the law is the basic premise of our judicial system. But unless every individual in our adversary system has the means to determine all available defenses and to assert these defenses at his trial, then equality for all before the law is not realized.

The case of *Gideon v. Wainwright*[7] laid the foundation for assuring every indigent criminal defendant the assistance of counsel in state court proceedings. The issue now facing us is whether the appointment of counsel is sufficient in all cases to protect the rights of the individual defendant. There are many cases in which the attorney must have funds for investigative services, expert witnesses, or other necessary expenses connected with the trial. Without such funds appointed counsel cannot present the quality defense demanded by the adversary system. If appointed counsel cannot obtain existing evidence crucial to the defense, the defendant will not receive a fair trial. Under such circumstances is a defendant denied due process of law, equal protection of the law, or assistance of counsel when he cannot present an existing defense because of lack of funds? Is the mere appointment of counsel alone sufficient for the defense of the poor? If the basic premise is true that our adversary system demands that every individual charged with a crime have at his disposal the means necessary to determine all available defenses and be able to assert these defenses at his trial, then the state must furnish funds for such expenses.[8]

The Mississippi Supreme Court in *Phillips v. State*[9] was confronted with the issue of whether an indigent defendant was entitled to a psy-

[6] Goldstein and Fine, *The Indigent Accused, The Psychiatrist, and The Insanity Defense,* 110 U. PA. L. REV. 1061, 1062-63 (1962); *see* Steinberg and Paulsen, *A Conversation With Defense Counsel on Problems of a Criminal Defense,* 7 THE PRACTICAL LAWYER (May 1961, at 25-26).

[7] 372 U.S. 335 (1963).

[8] The Criminal Justice Act of 1964, 18 U.S.C.A. § 3006A (1965) provides payment for an attorney to represent "a poor" defendant and makes available funds to secure investigatory, expert and "other" services. For a list of nine states which offer some aid in addition to appointed counsel *see* 1 SILVERSTEIN, DEFENSE OF THE POOR 16 (1965).

[9] 197 So. 2d 241 (Miss. 1967).

chiatric examination to determine if he was insane when the crime was committed. The court gave the following answer in denying the motion:

> Neither the United States Constitution nor the Mississippi Constitution requires that the Nation or State furnish an indigent defendant with the assistance of a psychiatrist. The only assistance that they require is the assistance of legal counsel.[10]

Phillips was convicted of assault and battery with intent to kill following a fight and a gun battle at a night club. The testimony showed that he had taken five "goof balls" and had consumed a large amount of intoxicating liquor on the day of the incident.[11] The defendant testified that he had been in three mental institutions[12] and that his family had a history of mental illness.[13] Appointed counsel made a motion for the appointment of a psychiatrist to determine if Phillips was insane at the time of the crime. By statute[14] in Mississippi a mental examination may be ordered by the court where the competence of a defendant to stand trial is in issue, but no provision has been made by the legislature for the defendant who pleads insanity at the time of the crime. Counsel for Phillips clearly made no contention that Phillips was incompetent to stand trial, only that Phillips was insane at the time of the crime.[15] Counsel also requested funds for the transportation of two witnesses who were with Phillips at the time of the fight.[16] Both witnesses had been returned to Ohio to answer charges in that state. These witnesses were the only ones who were competent to testify as to the behavior and actions of Phillips on the day of the incident. When these motions were denied, Phillips was effectively prevented from asserting the one defense available. Expert testimony was denied, and the testimony of lay witnesses was prevented. Under such circumstances it is impossible to contend that the appointment of counsel alone was sufficient for the operation of the adversary system. Certainly equal justice for all demands more than this.

The *Phillips* case illustrates one type of situation where appointed counsel is insufficient to provide equal justice. Another example occurs in a case in which the defendant is in another state at the time the crime was committed, but due to a mistaken identity he is wrongfully accused. The defendant in this case needs both an investigator to locate the needed witnesses and funds to pay for their transportation to the trial. Without these and with mistaken eye witnesses, the defendant is forced to trial without the defense he must have. For another example examine the situation of a defendant who is accused of forging a check. A handwriting expert could easily prove that the defendant could not have signed the instrument. In such a case the defendant should not lose the testimony of the handwriting specialist because he lacks the funds to pay the required fee.

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[10] *Id.* at 244.
[11] *Id.* at 243.
[12] *Id.*
[13] *Id.* at 242.
[14] Miss. Code Ann. § 2575.5 (Supp. 1966).
[15] Phillips v. State, 197 So. 2d 241, 242 (Miss. 1967).
[16] *Id.* at 243.

The problem faced by the indigent when he needs aid in addition to counsel is compounded when the prosecution is dishonest. The consequences for an indigent defendant are much more tragic where the prosecution presents false evidence or withholds evidence from the trial. The indigent defendant, too, should be able to force the prosecution to remain honest.

The case of *Miller v. Pate*[17] is a vivid example of the consequences for the indigent when the court and the jury must rely solely on the testimony of the State's expert witness. In 1955 the defendant was sentenced to death for the brutal rape-murder of an eight-year-old girl. The trial court denied a defense motion for a scientific inspection of the physical evidence the prosecution intended to introduce. At the trial a pair of men's underwear, covered with large, dark, reddish-brown stains, was introduced into evidence. The state claimed the shorts belonged to the defendant. The victim had type A blood and the defendant had type O blood. A chemist for the State Bureau of Crime Identification testified that the blood on the shorts was type A. In subsequent federal habeas corpus proceeding, where an expert was appointed for the defendant, the shorts were found not to contain blood stains but *red paint*. Needless to say the Supreme Court held that a criminal conviction obtained by the knowing use of false evidence violates the fourteenth amendment. The conclusion reached by Justice Stewart that "[t]he prosecution deliberately misrepresented the truth is inescapable."[18]

II. Effective Assistance of Counsel

The sixth amendment[19] guarantees that every defendant has the right to the assistance of counsel. The case of *Gideon v. Wainwright*[20] held that this guarantee at least means that the state must furnish every indigent defendant counsel in a felony prosecution. *Miranda v. Arizona*[21] extended the right to counsel to in-custodial interrogation. In two later decisions the Fifth Circuit Court of Appeals has applied the *Gideon* rule to misdemeanor cases.[22] In the *Gideon* decision Justice Black acknowledged the nature of our adversary system of trial; and he stated that consistent with reason, fairness, and justice it must be recognized that an accused cannot have a fair trial without the assistance of counsel, and that assistance of counsel in an adversary system is a fundamental and essential necessity.[23] In those cases where counsel alone will not be sufficient to guarantee fairness and equal justice, does the assistance of counsel guaranteed by the sixth amendment include such additional aid? The question is whether assistance of counsel means the *effective* assistance of counsel. Effective assistance of counsel means that counsel should have the necessary expert and investigative services demanded by the circumstances of the case to insure an adequate and effective defense.

[17] 386 U.S. 1 (1967).

[18] *Id.* at 6.

[19] U.S. CONST. amend. VI.

[20] 372 U.S. 335 (1963).

[21] 384 U.S. 436 (1966).

[22] Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965); McDonald v. Moore, 353 F.2d 106 (5th Cir. 1965).

[23] Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

The question of when an indigent defendant has received "effective" aid of counsel was examined by the Supreme Court in the famous case of *Powell v. Alabama*.[24] *Powell* represents a limited recognition of the right of an indigent to "effective aid in the preparation and trial of the case."[25] At that time, however, the court was only willing to grant effective aid in a limited class of circumstances. *Powell* held that at least in a capital case an indigent defendant is denied due process without effective aid of counsel. In *White v. Ragen*[26] the Supreme Court held "that it is a denial of the accused's constitutional right to a fair trial to force him to trial with such expedition as to deprive him of the effective aid and assistance of counsel."[27] Due process was held to be violated and a defendant denied the effective assistance of counsel in *Hawk v. Olson*[28] where the state denied the defendant the right to consult with his attorney. The Court said that the fourteenth amendment is violated whenever "a defendant is forced by a state to trial in such as way as to deprive him of the effective assistance of counsel."[29] In *Avery v. Alabama*[30] the Supreme Court stated that the guarantee of the fourteenth amendment is not satisfied by a mere formal appointment of counsel, and a denial of the opportunity to confer or consult with the accused and to prepare the defense would convert the appointment into a sham.

When the attorney is of such a caliber that the appointment will "amount to a farce or mockery of justice,"[31] the conviction will be set aside because the defendant has been denied effective representation by counsel. Judge Coleman of the Fifth Circuit in commenting on this problem said that "an accused represented by appointed counsel [has] a right to expect a devotion at least equal to that expected from compensated counsel of an accused's own choosing."[32] In *Glasser v. United States*[33] the Supreme Court held that a defendant was denied the effective assistance of counsel as guaranteed by the sixth amendment where the trial court appointed counsel for two defendants with conflicting interests.

In *United States v. Germany*[34] Judge Johnson of the Federal District Court of Alabama held that effective assistance of counsel is required by the sixth amendment. Where a court appointed attorney for an indigent defendant believes "it is reasonably necessary for him to incur expenses for traveling . . . and interviewing material witnesses, the 'effective assistance of counsel' mandate requires that the . . . expenses be made available to him by the United States."[35] Thus what

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[24] 287 U.S. 45 (1932).

[25] *Id.* at 71.

[26] 324 U.S. 760 (1945).

[27] *Id.* at 764.

[28] 326 U.S. 271 (1945).

[29] *Id.* at 276.

[30] 308 U.S. 444 (1940); *See e.g.*, Jones v. Cunningham, 297 F.2d 851 (4th Cir. 1962).

[31] Grove v. Wilson, 368 F.2d 414, 416 (9th Cir. 1966); *See e.g.*, Scalf v. Bennett, 147 N.W.2d 860 (Iowa 1967).

[32] Williams v. Beto, 354 F.2d 698, 705 (5th Cir. 1965).

[33] 315 U.S. 60 (1942).

[34] 32 F.R.D. 421 (M.D. Ala. 1963).

[35] *Id.* at 424.

has been obvious has finally been said—assistance of counsel cannot be rendered where the defendant is denied aid in addition to counsel because of a lack of funds. When we remember the nature of our adversary system and our commitment to equal justice for all, we see that effective assistance of counsel requires that aid necessary to equip every defendant to discover and present the defenses available to him.

III. Equal Protection and Due Process

The issue confronting the courts is whether the limits of the equal protection clause and the due process clause of the fourteenth amendment have been reached where the rights of the indigent criminal defendant are concerned. The extent to which the equal protection and due process clauses have been extended is illustrated by the case of *Griffin v. Illinois*.[36] If the premise that all men stand equal before the law is still valid, then even the scope that *Griffin* has given to the equal protection clause falls short of what is needed to insure true equality. In the narrowest sense *Griffin* holds that when a state has adopted a system of criminal appeals, the fourteenth amendment prevents a state from barring indigent defendants from appellate review simply because the defendants lack funds to furnish a transcript of the trial proceedings upon which appellate review is conditioned under state law. But the spirit of this case goes much further in an examination of the problems faced by the defendant without funds for a defense.

The Supreme Court in *Griffin* made the basic assumption that errors were made in the trial proceedings "which would merit reversal, but that petitioners could not get appellate review of these errors solely because they were too poor to buy a stenographic transcript."[37] This is the type of assumption that the court should make for the indigent defendant who has been denied expert testimony at his trial. The problem with *Griffin* is that although the appellate court will have a transcript of the trial proceedings, all relevant facts will not appear in the record since there is no guarantee that the defendant will be able to present an adequate defense. The following assumption is suggested: an indigent defendant needs the services of a highly skilled and expensive expert witness. Because no funds are provided for such services, appointed counsel proceeds to trial without needed testimony, and the defendant is convicted. Under the limited rule of *Griffin* a transcript of the trial proceedings must be furnished the defendant for appellate review, but the transcript will not serve the needs of the defendant, for the errors in the trial will not appear in the record. All that will appear is the denial of the motion for the expert if indeed such a motion was made. Another example of the type of hidden errors that will not appear in the transcript is false evidence as discussed previously in *Miller v. Pate*.[38] Such cases clearly illustrate that the promise of *Griffin* that "[b]oth equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court'"[39] has not been fulfilled.

[36] 351 U.S. 12 (1956).

[37] *Id.* at 16.

[38] 386 U.S. 1 (1967).

[39] Griffin v. Illinois, 351 U.S. 12, 17 (1956).

The cases following *Griffin* have expanded its limited rule to other circumstances. In *Douglas v. California*[40] the court made it clear that the state can classify an indigent defendant in a different category from other defendants as long as the result "does not amount to a denial of due process or an 'invidious discrimination.'"[41] *Smith v. Bennett*[42] makes it clear that no financial condition can be interposed between a defendant and his right to the appellate courts. *Lane v. Brown*[43] continued the spirit of *Griffin* in holding that any appellate proceeding that could be instituted by a defendant with funds must be made available on an equal basis to the indigent defendant. The *Griffin* principle was held to apply with equal force to state collateral proceedings even after the state has already provided one review on the merits.[44] Thus *Lane* establishes the right of an indigent defendant to appeal from an adverse decision in a post-conviction proceeding if a defendant with funds can make such an appeal. Thus it is clear that every indigent criminal defendant has the equal protection of the laws when he appeals his conviction, and he will not be penalized by his poverty in his post-conviction relief. So far, however, the words of Justice Black in *Griffin* that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has"[45] has had little meaning for the indigent criminal defendant in need of aid in addition to counsel at his trial.

IV. The Position of the Courts

Since the indigent defendant's right to appointed counsel was granted so recently,[46] it is not surprising that the courts have been reluctant to provide additional aid for the indigent. It should be noted that it was not until appointed counsel began raising the issue of additional aid for the indigent that the courts were regularly faced with this issue. The important cases in this area are presented here to illustrate the difficult time the courts have had in this area.

Many of the cases in which the defense has requested the services of an expert concern the need for independent psychiatric testimony. Mississippi's answer to a motion for psychiatric assistance in *Phillips v. State*[47] has previously been discussed, but the attitude taken by this court adequately describes the views of many state courts. In *Phillips* the court held that the only assistance required by the state or United States Constitution was the assistance of counsel.[48]

In *United States ex rel. Robinson v. Pate*,[49] the conviction of an indigent defendant was overruled because the defendant was not given a fair opportunity to obtain necessary expert testimony. Due process was

[40] 372 U.S. 353 (1963).

[41] *Id.* at 356.

[42] 365 U.S. 708 (1961).

[43] 372 U.S. 477 (1963).

[44] *Id.* at 484-85.

[45] Griffin v. Illinois, 351 U.S. 12, 19 (1956).

[46] Gideon v. Wainwright, 372 U.S. 335 (1963).

[47] 197 So. 2d 241 (Miss. 1967).

[48] *Id.* at 244.

[49] 345 F.2d 691 (7th Cir. 1965), *aff'd in part*, Pate v. Robinson, 383 U.S. 375 (1966).

held to be violated because the defendant was denied an adequate sanity hearing. The court held that it would be a violation of due process to convict a legally incompetent defendant. This case raises more questions than it answers. Unless aid in some form is furnished counsel for the indigent, it is impossible to see how the issue of insanity can properly be raised. As in *Phillips v. State*,[50] counsel for the indigent may be prevented from presenting even lay witnesses because the defendant cannot pay for their transportation to the trial. In such circumstances the issue of insanity must be established by the testimony of the defendant alone if it is to be established at all.

The case of *Bush v. McCollum*[51] clearly illustrates the difficult time the courts have had with this issue. Bush was convicted in 1960 in a Texas court after a motion was denied for independent psychiatric assistance. On the testimony of lay witnesses and a general medical practitioner Bush was found to be sane in spite of the fact that he had been declared insane in 1924. Under Texas law the prior adjudication of insanity meant that the state had the burden of proving his sanity beyond a reasonable doubt. The Supreme Court of the United States remanded the case without passing on the question of whether due process had been violated by the conviction.[52] On remand a sanity hearing was held to determine if the defendant was sane at the time of the offense. The defendant was found to be sane on the testimony of two state psychiatrists and a general practitioner. In subsequent habeas corpus proceedings the federal district court held that the failure to provide Bush with an opportunity to prepare his defense denied due process of law guaranteed by the fourteenth amendment. "[T]he right to counsel is meaningless if the lawyer is unable to make an effective defense because he has no funds to provide the specialized testimony which the case requires. . . . In order for Bush . . . to have the effective aid of counsel, it was necessary for his counsel to have the assistance of a qualified psychiatrist. . . ."[53] Some writers insist that this case does not require the appointment of a psychiatrist for the indigent and would limit its holding to require only that the defendant be given the full opportunity to raise the issue of insanity.[54] It appears in *Bush*, however, that the only way the issue of insanity can properly be determined is for counsel to have the aid of a psychiatrist in the preparation of the defense.

In *Jacobs v. United States*[55] the court examined the problem faced by the indigent in proving his insanity without psychiatric testimony in a proceeding to set aside a judgment entered on a plea of guilty in federal court. Appointed counsel presented lay witnesses who testified that the defendant was of inferior intelligence and was probably insane at the time of both the trial and crime. The court held that the appointment of a psychiatrist at the government's expense was required since a substantial question was raised as to the defendant's mental capacity.[56]

[50] 197 So. 2d 241 (Miss. 1967).

[51] 231 F. Supp. 560 (N.D. Tex. 1964), *aff'd*, 344 F.2d 672 (5th Cir. 1965).

[52] Bush v. Texas, 372 U.S. 586 (1963).

[53] Bush v. McCollum, 231 F. Supp. 560 (N.D. Tex. 1964), *aff'd*, 344 F.2d 672 (5th Cir. 1965).

[54] Lewin, *Indigency—Informal and Formal Procedures To Provide Partisan Psychiatric Assistance To The Poor*, 52 IOWA L. REV. 458 (1966).

[55] 350 F.2d 571 (4th Cir. 1965).

[56] *Id.* at 573.

The Court properly held that only the defendant's "inability to pay for the services of a psychiatrist prevented a proper presentation of his case. The Supreme Court has unmistakably held that in criminal proceedings it will not tolerate discrimination between indigents and those who possess the means to protect their rights. *Griffin v. People of State of Illinois.* . . . The handicap under which the court-appointed lawyer was compelled to present the case contrasts markedly with the advantage enjoyed by the government."[57]

As pointed out in the *Jacobs* case, the state particularly enjoys an advantage against an indigent defendant when insanity is at issue. The state will have the advantage of psychiatrists employed by the state while the defense must rely on the testimony of lay witnesses. While the integrity of the state psychiatrists is not questioned, in our adversary system both sides should enjoy the same advantage for the system to operate properly. As stated by Justice Frankfurter in the dissenting opinion in *United States ex rel. Smith v. Baldi*,[58] "[a] denial of adequate opportunity to sustain the plea of insanity is a denial of the safeguard of due process in its historical procedural sense which is within the incontrovertible scope of the Due Process Clause of the fourteenth amendment."[59] In *Smith* the defendant had been convicted of murder in Pennsylvania. Although the trial court had appointed a psychiatrist to examine the defendant and to testify as an *impartial witness*,[60] counsel for the defendant argued that the state was required to appoint a psychiatrist to give pretrial assistance. The Supreme Court concluded in the majority opinion that "[P]sychiatrists testified. That suffices."[61]

The court in *Smith* relied on *McGarty v. O'Brien*,[62] but in *McGarty* the state had provided two impartial psychiatrists whose reports had been made available to the defendant's counsel. The court did not decide the broad constitutional question of whether due process requires the appointment of a psychiatrist when the defendant has no expert testimony on which to base a defense, but the court pointed out that "[h]ow far the state . . . is required under the due process clause to minimize the disadvantage [of poverty] is a matter which, in other contexts, may deserve serious examination."[63]

The cases of *Smith* and *McGarty* should not be taken as precluding due process as a basis for requiring the states to furnish psychiatric assistance, for in both cases the courts rejected the arguments of the defendants on the ground that psychiatrists had examined the defendants and their reports were made available to the defense. Indeed, these cases

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[58] 344 U.S. 561 (1953).

[59] *Id.* at 571.

[60] The issue of whether a state employed psychiatrist can be an *impartial* witness is raised in the following articles: Lewin, *Mental Disorder And The Federal Indigent*, 11 S.D. L. Rev. 198, 215-18 (1966); Lewin, *Indigency—Informal And Formal Procedures To Provide Partisan Psychiatric Assistance To The Poor*, 52 Iowa L. Rev. 458; Goldstein and Fine, *The Indigent Accused, The Psychiatrist, And The Insanity Defense*, 110 U. Pa. L. Rev. 1061, 1066-76 (1962).

[61] United States *ex rel.* Smith v. Baldi, 344 U.S. 561, 568 (1953).

[62] 188 F.2d 151 (1st Cir. 1951), *cert. denied*, 341 U.S. 928 (1951).

[63] *Id.* at 155.

can be taken to mean that in any case where insanity is seriously in issue the state must furnish psychiatric assistance. Thus as in *Bush,* decided after *Smith* and *McGarty,* the court can hold that the defense must be given at least the opportunity to present the defense of insanity.

Many forms of aid in addition to the aid of counsel have been denied by various courts. In denying such aid the courts have not been uniform in their approach. Some courts look no further than to the statutes. Thus in *People v. Ostrand*[64] a motion requesting a handwriting expert was denied because no legislative authority existed for such expenditures.

In *State v. Chapman*[65] the defense sought the appointment of an eye specialist. The defendant was accused of stealing a car. To secure the defendant's conviction the state had to prove that he had driven the car at night. The defendant claimed that an eye condition made it impossible for him to drive at night. Because he could not afford a specialist and the state would not pay the necessary expenses, the defendant was prevented from asserting his defense. Certainly the spirit of *Griffin v. Illinois*[66] was violated by this case. In *Griffin* the court said, "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[67] Disregarding this concept, the Missouri Supreme Court held it was not essential to the minimum requirements of due process that such aid be furnished an indigent defendant.

The most interesting reasoning used to deny a defendant the services of an expert witness is found in *State v. Superior Court.*[68] The trial court entered an order providing for funds to furnish medical testimony at the trial concerning chronic alcoholism, the essence of the defendant's defense. In reversing the trial court the Arizona Supreme Court held that the state is not required to furnish the defendant a "full paraphernalia of defense."[69] The court said that the failure to provide such a defense was not "invidious discrimination" condemned by *Griffin v. Illinois*[70] and that this would not reduce the trial of an indigent to a "meaningless ritual" condemned by *Douglas v. California.*[71] In addition the court said that it also was not the "custom"[72] to furnish indigents with such a defense and that "our constitution foundations tolerate and even encourage private enterprise and private property. With this system come inequalities of infinite variety. . . . Some intrude even into the sanctity of the courtroom itself."[73] The Arizona Court is indeed using a strange standard because the indigent criminal defendant is not facing another individual who has fared better under the private enterprise system but

[64] 351 Ill. 2d 520, 221 N.E.2d 439 (1966).

[65] 365 S.W.2d 551 (Mo. 1963).

[66] 351 U.S. 12 (1956).

[67] *Id.* at 19.

[68] 2 Ariz. App. 458, 409 P.2d 742 (1966); *see* also State v. Superior Court, 2 Ariz. App. 466, 409 P.2d 750 (1966), where the court also denied expenses for a handwriting specialist.

[69] 2 Ariz. App. 458, 409 P.2d 742, 744 (1966).

[70] 351 U.S. 12 (1956).

[71] 372 U.S. 353 (1963).

[72] State v. Superior Court, 2 Ariz. App. 458, 409 P.2d 742, 746 (1966).

[73] *Id.*

instead is facing the economic power of the *state*. As was stated in *Jacobs v. United States*,[74] "[t]he handicap under which the court-appointed lawyer [is] compelled to present the case contrasts markedly with the advantage enjoyed by the government."[75] The contest involved here is between an individual and the state. The state has unlimited resources at its disposal to prosecute and state-employed experts on the payroll. The problem involved is not whether private enterprise will be discouraged by providing a defendant with assistance, but whether the *individual* will be left without an adequate defense solely because he lacks funds. Even the middle income individual cannot afford the "full paraphernalia"[76] of a complete defense when several expert witnesses must testify.

Several state courts have granted some form of additional expenses for indigent defendants. As in those instances where such aid was denied, the courts have not been consistent with their approach to the problem.

In *State v. Horton*[77] the New Jersey Supreme Court approved the concept of providing appointed counsel with whatever expenses are necessary for a proper defense of an indigent. A New Jersey statute provided for "reasonable compensation" for appointed counsel in murder cases. The trial court had rejected as unreasonable the defense attorney's request for compensation. The New Jersey Supreme Court reversed and remanded the case for further proceedings. After discussing the guidelines for the trial court in its determination of compensation, the court indicated that it was willing to go even further in providing additional aid for the defense of the indigent defendant when it said:

> Customarily, and we think properly so, the reasonable costs of necessary items such as experts, whether witnesses or not, medical examinations, scientific tests, photographs, depositions and transcripts, and, in essential circumstances, professional investigations, have been ordered paid from public funds by trial courts. The constitutional obligation to furnish counsel to an indigent can sensibly only be construed to include as well that which is necessary to proper defense in addition to the time and professional efforts of an attorney. . . .[78]

The inherent power of a court mentioned in *Horton* to provide for the expenses to defend an indigent is best illustrated by *Illinois ex rel. Conn v. Randolph*.[79] The court provided for fees plus living expenses for attorneys far in excess of that allowed by a statute providing for compensation of attorneys. An interesting feature of this case is that the court provided for the payment of the additional expenses from the funds provided to prosecute criminal cases on the theory that "'prosecution' of indigent convicts cannot constitute and proceed unless the trial

[74] 350 F.2d 571 (4th Cir. 1965).

[75] *Id.* at 573.

[76] State v. Superior Court, 2 Ariz. App. 458, 409 P.2d 742, 744 (1966).

[77] 34 N.J. 518, 170 A.2d 1 (1961).

[78] *Id.*, 170 A.2d at 9; *but see* State v. Rush, 87 N.J. 49, 207 A.2d 724 (1965) where the court said that this language in *Horton* as applied to non-murder cases is dictum.

[79] 35 Ill. 2d 24, 219 N.E.2d 337 (1966).

court provides counsel for the accused convicts. . . . [T]he provision for payment of 'prosecution' costs is clear statutory authority for reimbursements of fees and costs to the [attorney] by the state."[80] The fees allowed by the court were for expenses incurred by defense counsel while living away from home after a change of venue moved the trial of the case to another county 150 miles away. Expenses were also allowed for stenographic and witness fees.[81] Under the unusual circumstances of the case the court stated that it had the inherent power to enter the necessary order authorizing such expenditures.[82]

In *State v. Watson*[83] an unusual method was used to furnish the needed expenses for an expert witness. The defendant was charged with attempting to commit forgery by delivery of forged traveler's checks. The court held that the indigent defendant had a constitutional right to be provided a handwriting specialist at state expense. The court specifically held that every defendant had the right to compulsory process as guaranteed by the sixth amendment to the United States Constitution; and that where an expert witness was required to be summoned for the defense of indigent accused, the state must pay the expert for his necessary preparation to testify at the trial.[84] The court recognized the distinction between

> [T]he right to call witnesses and the right to have these witnesses paid for by the government, but in certain instances involving indigents, the lack of funds with which to pay for the witnesses will often preclude him from calling that witness and occasionally prevent him from offering a defense. Thus, although the defendant is afforded the shadow of the right to call witnesses, he is deprived of the substance.[85]

V. Conclusion

For many defendants prosecuted in our state courts, the guarantee of the assistance of counsel is still not complete. Each defendant must be given equal opportunity with the state to discover and present evidence if our criminal trials are to be fair. Without such reform our criminal court system will remain an instrument of oppression and not an institution of social justice. The criminal laws are designed to keep the individual within the limits of acceptable behavior as determined by society. The state, as prosecutor, must be kept within limits just as the individual must be kept within the bounds of acceptable behavior. As long as our criminal courts rely on the adversary process to find the truth, cases similar to the miscarriage of justice found in *Miller v. Pate*[86] are possible. The main problem, however, arises not when false evidence is used, but simply where the defendant cannot present his defense solely because of a lack of funds.

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[80] *Id.*, 219 N.E.2d at 341.
[81] *Id.*, 219 N.E.2d at 340.
[82] *Id.*
[83] 36 Ill. 2d 228, 221 N.E.2d 645 (1966).
[84] *Id.*, 221 N.E.2d at 648.
[85] *Id.*
[86] 386 U.S. 1 (1967).

A standard to determine whether any person has received the necessary assistance in the preparation of his defense is needed. The following standard is suggested. Every defendant regardless of his financial condition should be able to discover every available defense and present such defenses at his trial. To the extent that the defendant cannot provide the funds required for such discovery, the state should furnish the required funds. Anything less denies a fair trial. Under this standard the defense counsel should not be given a blank check to use state funds. He should be required to show the trial court the reason for the expenditures and that the required funds are beyond the financial means of the defendant. Should the defendant be financially able to afford a part of the expenses, he should pay that part. The part he cannot afford should be furnished by the state.

The assistance of counsel as guaranteed by the sixth amendment to the United States Constitution must include more than the appointment of counsel. Counsel alone in many instances cannot guarantee that every defendant receives a fair trial. When the circumstances of a case demand an expert witness, appointment of counsel cannot under any standard guarantee the needed assistance. Assistance must mean effective aid.

Leon Carl Hagwood

Peremptory Challenge—Systematic Exclusion of Prospective Jurors on the Basis of Race

Even the most casual observer of our time cannot but notice a movement toward constitutionalized due process and strict enforcement of the equal protection clause in criminal trials of Negro defendants. From *Strauder v. West Virginia*[1] to the present, the nation's highest courts have consistently held that action by a state through its courts, legislature, or by its administrative officers, which results in the exclusion from jury service solely on the basis of race will be a denial of the equal protection of the laws,[2] and "is at war with our basic concepts of a democratic society."[3] The decisions have concerned themselves with methods by which prospective jurors are qualified and selected as being eligible for jury service. In spite of these elaborate measures designed to secure a fair and impartial jury by eliminating the main source of alleged racial discrimination in the administration of justice, there remains one glaring fault. If it is true that there is some advantage in having members of a criminal defendant's race on the trial jury, a proposition not entirely free from doubt, but upon which the whole notion of discrimination is systematic exclusion is based, then such advantage is not gained merely through the assurance that prospective jurors will be qualified through a uniform and non-discriminatory means. If the state prosecutor is allowed through the use of the peremptory challenge to exclude from the jury all members of the defendant's race, then all the advantage supposedly gained by their presence is lost. Regardless of how many veniremen there are of defendant's race, if

[1] 100 U.S. 303 (1880).

[2] *E.g.*, Carter v. Texas, 177 U.S. 442 (1900).

[3] Smith v. Texas, 311 U.S. 128, 130 (1940).

none actually serve on the jury because they are peremptorily challenged, then a form of systematic exclusion has occurred and the intent and purpose of an entire line of decisions has been thwarted. Strangely enough, in a fashion similar to the early English common law courts, the courts in this country have allowed their decisions on systematic exclusion to be largely ineffectual because of their deference to the widespread and continued use of the peremptory challenge by state prosecutors and the general inability of the courts to solve the conflict between the right to use the peremptory challenge and a defendant's right to be tried by a fair and impartial jury.

The essential conflict lies in the two opposing maxims. On the one hand lies an ancient and honored procedure whereby both the defendant and the prosecutor are allowed to dismiss from the jury without assigning any cause therefor[4] a number of those who are unsatisfactory even though it is difficult to formulate and sustain any legal objection to them.[5] On the other hand, there is the constitutional issue of whether a defendant is denied equal protection of the laws if the state is able to dismiss all prospective jurors of the defendant's race.

Before reviewing the arguments used in support of the challenge, it would be helpful to refer to the source and the present status of the challenge. It indeed has very old credentials. At common law the defendant in a felony trial was allowed to peremptorily challenge thirty-five jurors, and the prosecutor originally had the right to challenge any number of jurors without cause.[6] Largely because of the resulting delays, The Ordinance for Inquests provided that if "they that sue for the King will challenge . . . Jurors, they shall assign . . . a Cause certain."[7] As was the way with practitioners of the day, this statute was quickly circumvented by having those prospective jurors who were disagreeable stand aside. If a panel could be agreed upon, those who stood aside would be excused. Only when the entire list had been consumed was it necessary for the Crown to accept jurors not challenged for cause.[8] Although the peremptory challenge has fallen into disuse in England, its persistence and extensive use in this country demonstrates our belief that it is an essential part of trial by jury.[9]

There is no constitutional requirement for the peremptory challenge[10] and after The Ordinance for Inquests,[11] statutes were necessary in order to give the prosecutor such a right. In spite of its not being a constitutional right, even to the accused, it is still thought to be one of our most important rights[12] as it is a device whereby the jury-box can be freed of those unfit to be there without running the risk of alienating a juror by challenging him for cause and suffering an adverse ruling from the bench.[13]

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[4] Pointer v. United States, 151 U.S. 396, 408 (1894).

[5] Hayes v. Missouri, 120 U.S. 68 (1887).

[6] Co. Litt. 156b (1st Amer. ed. 1853).

[7] 33 Edw. 1, Stat. 4 (1305).

[8] *E.g.*, United States v. Marchant, 25 U.S. (12 Wheat.) 480 (1827).

[9] *E.g.*, Lewis v. United States, 146 U.S. 370, 376 (1892).

[10] Stilson v. United States, 250 U.S. 583, 586 (1919).

[11] 33 Edw. 1, Stat. 4 (1305).

[12] Pointer v. United States, 151 U.S. 396, 408 (1894).

[13] Hayes v. Missouri, 120 U.S. 68 (1887).

If the decision were merely one between the constitutional claim of equal protection and the non-constitutional claim of the unbridled use of the peremptory challenge, there would be little left for deliberation, since *Marbury v. Madison*[14] held that the Constitution compels a choice of the constitutional claim over the non-constitutional claim when the two are drawn in conflict.[15] This raises the question of whether there has been a denial of constitutional rights by the exclusion of the jurors of defendant's race. The time-honored view is that a defendant in a criminal case is not entitled to any particular juror, but merely a fair and impartial jury.[16] In other words, the Constitution does not require that a defendant must be tried by a jury composed of or including members of his race.[17] Such is merely a fancied advantage;[18] not a constitutional right. It follows that if a defendant is not entitled to a particular juror, then he cannot complain of the absence of some juror who has been challenged by the prosecutor since the right to trial by jury includes the right to reject jurors, but not the right to select them.[19] Apparently the purpose of the peremptory challenge is to give either the prosecutor or the defendant some device, short of a challenge for cause, whereby this right of rejection could be carried out.[20] Through the use of the peremptory challenge the defendant could say who would not try him, but not who would try him.[21] If the right to trial by jury grants to the defendant only this right of rejection, then he is furnished ample opportunity to reject those disagreeable to him, and he should not complain of the absence of some juror if a fair and impartial jury remains.[22]

The next step in the development of the argument for the challenge cannot be passed without some considerable difficulty. The thinking is that if the veniremen are selected in a non-discriminatory manner, a fair and impartial trial should naturally follow.[23] It is submitted that there is no sound basis for this conclusion. To a given defendant the primary concern as to the jury will be with those twelve men who ultimately decide his guilt or innocence. It is indeed unlikely that knowledge of a fair selection of veniremen is any consolation or of any particular concern to him. This is especially so when that element of racial balance which made the selection fair was destroyed "arbitrarily and capriciously"[24] by the use of the peremptory challenge. Once a group of prospective jurors has been picked through a non-discriminatory method, all constitutional restraint should not be lifted. The courts and counsel must continue to guard against infringement of defendant's constitutional rights throughout the entire judicial process, and this surely

[14] 5 U.S. (1 Cranch) 137, 178 (1803).

[15] Swain v. Alabama, 380 U.S. 202, 244 (1965) (dissenting opinion).

[16] *E.g.*, Harraway v. State, 203 Ark. 912, 159 S.W.2d 733, *cert. denied*, 317 U.S.

[17] Hall v. United States, 168 F.2d 161 (D.C. Cir. 1948).

[18] *Id.*

[19] *E.g.*, United States v. Marchant, 25 U.S. (12 Wheat.) 480 (1827).

[20] *See* United States v. Marchant, 25 U.S. (12 Wheat.) 480 (1827).

[21] *Id.*

[22] Hayes v. Missouri, 120 U.S. 68 (1887).

[23] *See, e.g.*, Harraway v. State, 203 Ark. 912, 159 S.W.2d 733, *cert. denied*, 317 U.S. 648 (1942).

[24] Pointer v. United States, 151 U.S. 396, 408 (1894).

includes the final selection (or rejection) of those twelve men who will sit in judgment.

Unfortunately, many courts have treated the peremptory challenge as if it were some divine right beyond reproach, as if it were its own justification. This has not, however, been the unanimous view as evidenced by the Ordinance for Inquests.[25] Through this statute England forbade the use of the peremptory challenge by the prosecutor. It must be recalled, however, that until this time the English prosecutor had enjoyed unlimited challenges without cause which led to infinite delay[26] and created a general distaste for the use of the peremptory challenge. Another plausible reason for the English prohibition may be the greater likelihood there of obtaining a homogenous group of veniremen.[27] At any rate, this has been offered as a reason for their general disuse in England today. If the peremptory is not an inalienable right, but is one of the most important rights granted to the accused[28] and is an effective means of ridding the jury of those unfit to serve,[29] then some substantially improved rationale for its continued use must be offered.

One failure of the courts has been their repeated efforts to justify the continued use of the peremptory challenge solely on the concept that as a challenge without cause, no inquiry could be made into its use for a cause. But to say that a peremptory challenge is one without cause is quite inaccurate. As a matter of fact, there could hardly be a challenge without cause. The whole nature of the peremptory is not that there is no cause for the challenge, but rather that it is unnecessary to assign such a cause even though there should always be some reason for the action.[30] If there is such a reason, and yet the reason need not be assigned, then there is considerable difficulty assessing whether or not the reason was discriminatory, for there is no method of discerning what the reason was. The situation appears as follows: there is a reason; it isn't necessary to make the reason known; if the reason were purely the race of the juror, it would be an unconstitutional practice. This difficulty has led some courts to say that no prosecutor would ever be safe if he peremptorily challenged a prospective juror of the same race as defendant since it would always be open to attack on the ground that the reason was purely race.[31] At this point the difficulty is really no different from discrimination in employment practices until we reach the distinguishing factor of cause. The employer has a cause which will become an issue of fact, and if found to be based solely on race, the practice will be discriminatory. The "cause for a peremptory challenge" cannot become an issue of fact for by its nature there is no cause. It can be with reason or for no reason at all.[32] If the prosecutor's action is subjected to scrutiny, it would not be a peremptory challenge, but, because of the search for a reason, it would become a challenge for cause.

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[25] 33 Edw. 1, Stat. 4 (1305).

[26] Co. Litt. 156b (1st Amer. ed. 1853).

[27] Swain v. Alabama, 380 U.S. 202, 218 (1965).

[28] Pointer v. United States, 151 U.S. 396, 408 (1894).

[29] Hayes v. Missouri, 120 U.S. 68 (1887).

[30] 1 F. Busch, Law and Tactics in Jury Trials § 139 (1959).

[31] *E.g.*, People v. Roxborough, 307 Mich. 575, 12 N.W.2d 466 (1943), *cert. denied*, 323 U.S. 749 (1944).

[32] Pointer v. United States, 151 U.S. 396, 408 (1894).

Although one cannot safely predict the attitude of the courts, the ancient credentials, the continued wide use, and the purpose served by the peremptory challenge seem to indicate a likelihood of its continued existence. Nevertheless, the inability to justify the departure from prohibiting discrimination in the selection of the veniremen to an allowance of possible discrimination in the actual impanelling of the twelve triers of fact can only lead to the prediction that some limitation is likely on the use of the peremptory challenge against the Negro member of the panel selected to try a Negro defendant.

The courts have only recently intimated there might be any limitations on the use of the peremptory challenge in this country. Prior to *Swain v. Alabama*[33] there had been a continuous line of decisions upholding the use of the peremptory challenge without any limitation at all. In *Swain*, where the issue was ripe for litigation and in which the facts would have warranted a limitation if ever they shall, the United States Supreme Court refused to condemn the use of the peremptory challenge when it was shown that there had not been a Negro on a trial jury in nearly fifteen years. The Court said there is a presumption that the prosecutor is using the peremptory challenge to obtain an impartial jury and "the presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes."[34] The Court held that the allegation or proof in a particular case that the prosecutor made discriminatory use of the peremptory challenge will not sustain the objection of denial of equal protection.[35]

The petitioner in *Swain* had, however, pressed a much broader claim before the Court and sought to prove his claim by a showing that no Negro had served on a petit jury in that county for the past fifteen years. Speaking of petitioner's contention, the Court said:

> His argument is that not only were the Negroes removed by the prosecutor in this case but that there never has been a Negro on a petit jury in either a civil or criminal case in Talladega County and that in criminal cases prosecutors have consistently and systematically exercised their strikes (challenges) to prevent any and all Negroes on the petit jury venires from serving on the petit jury itself. This systematic practice, it is claimed, is invidious discrimination for which the peremptory system is insufficient justification.[36]

Petitioner's argument clearly went directly to the issue that the peremptory challenge, as a legal institution, was no justification for the denial of a Negro defendant's right to equal protection if deprived of such by the use of the peremptory challenge. Faced with this frontal assault, the Court distinguished this particular case from those situations where there is a history of the use of the peremptory challenge to exclude Negroes. In other words, the Court seems to say that a course of conduct

[33] 380 U.S. 202 (1965).

[34] *Id.* at 222.

[35] *Id.*

[36] *Id.* at 222-23.

may rebut the presumption favoring the prosecutor that he has been using the peremptories in order to obtain a fair and impartial jury, but that no such course of conduct had been shown in *Swain*. Making this distinction, the Court said:

> But when the prosecutor in a county, in case after case, . . . is responsible for the removal of Negroes who have been selected by the jury commissioners and who have survived challenges for cause, with the result that *no* Negroes *ever* serve on petit juries, the Fourteenth Amendment claim takes on added significance. . . . In these circumstances, . . . it would appear that the purposes of the peremptory challenge are being perverted. If the State has not seen fit to leave a *single* Negro on *any* jury in a criminal case, the presumption protecting the prosecutor may well be overcome.[37] (Emphasis added.)

The Court first indulges in a presumption that any given prosecutor is trying to impanel a fair and impartial jury and that his motives will not be examined merely because of an allegation that he discriminated. Although it can be argued that all presumptions should favor the accused in a criminal proceeding to accord with the notions of due process, it would appear to be indeed a sad predicament when the integrity of the court's officers is presumptively attacked in order to afford the defendant the advantage of a fair and impartial jury. The presumption must continue that the prosecutor is seeking justice, for the entire judicial structure cannot long withstand a contrary public assumption. Since the presumption must favor the integrity of the prosecutor, and since it cannot be a rule of law, then the presumption that the prosecutor is utilizing the peremptory challenge to obtain an impartial jury must be rebutted in some other manner. At this point the Court in *Swain* seems to have stumbled.

As to the distinction between particular cases and a course of conduct there is no difficulty. All will agree that the continued, persistent exclusion of Negroes can raise the question whether the prosecutor's motives are honorable. At what point, then, does the prosecutor's course of conduct rebut the presumption? Is it a matter of time? These rhetorical questions are actually quite common to the law. More often than not the test of reasonableness creeps into the Court's holding giving a means by which conduct can be measured, even though this is still an unascertainable standard. The Court in *Swain*, however, did not say that unreasonable use of the challenge would rebut the presumption. It said that only when *no* Negro has *ever* served could the presumption be overcome.[38] Assuming the Court used these words figuratively, then the test will be a course of conduct. After some point the presumption favoring the prosecutor will be rebutted. The *Swain* case itself shows that the Court had no idea when such point would be reached. Although there may be some valid exceptions, it would seem that fifteen years of conduct, of any kind whatsoever, would be sufficient to establish a course of conduct. Yet, the Court in *Swain* solemnly refused to recognize that the presumption had been rebutted.

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[37] *Id.* at 223-24.

[38] *Id.*

The single greatest problem a petitioner will have in establishing his course of conduct is the nearly insurmountable burden of proof. He must show that the prosecutor has continuously and habitually challenged all Negroes solely on the basis of race, not only in the case at bar, but if the words of the Court are strictly interpreted, he must show that *no* Negro has ever served on a petit jury. Apparently the Court felt that if there had been even one Negro juror, there must have been some other reason for the challenge of the others; if not, the remaining Negro would also have been challenged. The reasoning of the Court evades the notion that one Negro could be placed on a jury in order to comply with the Court's formula. The Court also assumes that if a prosecutor will peremptorily challenge one or several Negroes solely on the basis of race, he will necessarily challenge all Negroes. Again it is submitted that such is not necessarily the case. If the prosecutor thought there would be no advantage to a defendant to have a given Negro on the jury, no objection would be made. Through such a method, he would not have to sacrifice any advantage to the defendant and would also be within the strictest interpretation of *Swain*.

If the above strict interpretation is discarded and only the course of conduct approach is used, the petitioner's burden is lessened only slightly. The reason is that since by definition no cause is given for the peremptory challenge, petitioner would have to successfully negative all other possible causes, legal or not, which the prosecutor might have had for the use of the peremptory challenge against each Negro over a reasonable period of time. It would seem that such a burden makes even the course of conduct approach virtually unworkable.

The cases which have followed *Swain* offer little help in our dilemma. In *Sims v. State*[39] where four Negroes had been systematically *included* on the jury list but were dismissed when the prosecutor exercised four of his premptory challenges, the court dismissed petitioner's claim that he had been denied equal protection of the laws by saying that "no showing was made that such procedure was customarily followed in order to exclude Negroes from jury service."[40]

Although Mississippi long ago upheld the unrestricted use of the peremptory challenge likening it to a privileged communication between an attorney and his client,[41] there has been very little judicial opinion on the matter. In *McLaurin v. City of Greenville*,[42] where the city had peremptorily challenged two Negroes, the court held that there was no merit to the contention that the matter should even be explored. The issue was again brought before the Mississippi Supreme Court in the recent case of *Shinall v. State*,[43] a case filled with allegations that Negroes had been systematically excluded from jury service solely on the basis of race. The court gave only the slightest consideration to defendant's contention that his rights had been denied him because of the State's use of the peremptory challenge. Although *Swain v. Alabama*[44] was cited in the opinion, the decision was actually based on the old

[39] 221 Ga. 190, 144 S.E.2d 103 (1965).

[40] *Id.* at 107.

[41] Evans v. State, 98 Miss. 697, 54 So. 154 (1911).

[42] 187 So. 2d 854 (Miss. 1966).

[43] 199 So. 2d 251 (Miss. 1967).

[44] 380 U.S. 202 (1965).

standard formula that the defendant does not have a right to select jurors; therefore, the State would not be required to accept a juror simply because he belonged to the same race or ethnic group as the defendant. It is submitted that in spite of recognition in the opinion, the Mississippi court actually ignored *Swain* and reverted to the older tests. This is not to say that any different conclusion would have been reached, however, since the most careful attention to the *Swain* test would leave the court in a situation of either interpreting *Swain* to mean that the defendant's burden of proof has not been met (since there seems no chance of it ever being met), or, that really all the Court in *Swain* did was affirm the older view that, because of its nature, the peremptory challenge could not be subjected to examination because of allegations of discrimination. If this is true, *Swain v. Alabama*[45] has by no means answered the problem. It has, however, been helpful in so far as answering that there are constitutional limitations on the use of the peremptory challenge. Rather than answer the question of what those limitations are, the Court has demonstrated the need for more ascertainable standards.

Although it would be imprudent to predict what the future limitations will be, there are several approaches to the problem. First of all, there are surely those who would advocate the total abolition of the peremptory challenge. This is, of course, by far the most unlikely. We have seen earlier how the peremptory challenge serves a useful and needed function to both sides of the controversy, civil or criminal. There may well be many times where one's intuition or experience leads to the feeling that a given juror would not fairly and impartially consider the evidence as presented in court. Although this intuitive objection would not sustain a challenge for cause, the peremptory challenge may be used quite satisfactorily at no risk to the attorney's case.

Secondly, there are those who would favor giving the defendant exclusive use of the peremptory challenge while denying its use to the state's prosecutor. Admittedly this solution relieves the problem of systematic exclusion by the prosecutor; however, in the quest to protect the rights of defendants, the public must not become so over-zealous that it loses sight of the prime function of the State. Too often those who complain of the actions of the State picture it as being some omnipresent being apart from all other consideration. Even though this is becoming true with alarming rapidity of our federal government, the State is an institution set up for the protection of society from itself. The State has no interest in being an aggressor; it is a means by which the law-abiding can be afforded some measure of protection against those who would seek to exploit and disregard the law. The law is not for the protection of one defendant against society. Quite the contrary, laws are there to protect society from wrongdoers. For this reason the better view would be to retain the peremptory challenge for the State as well as the defendant.

If conclusions can be drawn from the above discussion, one such conclusion must surely be that the old justification for the use of the peremptory challenge cannot long sustain an attack upon it as an institution. The Court is not likely to allow an unworkable standard like that

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[45] *Id.*

announced in *Swain v. Alabama*[46] to stand for very long. Each new case will cause an erosion of the peremptory challenge in favor of the equal protection of Negro defendants so that eventually a significant prohibition or at least a definite limitation on its use will result. If this conclusion of further limitation is perhaps the most likely result, does it necessarily follow that the peremptory challenge must gradually erode until there is at last little left of its original stature? It is here that the bar, in particular the prosecutors, may face the problem and offer their support to one possible solution. If the peremptory challenge is to be continued, if this ancient device has a place today, then the problem is not insoluble. There must, however, be a realistic appraisal of the situation. As long as the prosecutors continue to use the challenge as a means of invidious discrimination, the courts will strive to divest the prosecutor of his tool. The choice lies with those who invoke the challenges. If they continue to challenge solely on the basis of race, without regard to the qualifications of the juror, then surely they will lose the privilege. It seems hardly necessary to urge that such not be the course they take. Far more will be lost than gained. The peremptory challenge has served the bar well and can continue to do so if used to obtain a fair and impartial jury and not as a means of destroying itself.

Gary L. Geeslin

PRACTICE AND PROCEDURE—UNAUTHORIZED PRACTICE OF LAW

In a recent Mississippi case the Chancery Court of Neshoba County enjoined the Chancery Clerk of Neshoba County from engaging in the practice of law by preparing deeds, deeds of trust, notes, bills of sale, and title certificates, or preparing or certifying to any instrument giving an opinion as to validity of title to property, and the clerk appealed. The supreme court affirmed saying that a chancery clerk who was not licensed to practice law when she performed such acts was guilty of the unauthorized practice of law. *Darby v. Mississippi State Board of Bar Admissions,* 185 So. 2d 684 (Miss. 1966). The purpose of this note is to present some of the background and examples of the fight against unauthorized practice.

Most states have statutes which define the practice of law. However, it is generally agreed that definitions by the legislative branch of the practice of law are not exclusive and do not deprive the judicial branch of the power to determine what other acts not enumerated may constitute the practice of law.[1] Mississippi has a statute which makes it unlawful for any person to engage in the practice of law without a license, stating that any person who for a fee prepares any instrument to be filed in any court in this state, or gives counsel or advice therein, or writes any bill of sale, deed, deed of trust, mortgage, contract, will, or makes or certifies any abstract of title except in lands of his own is engaged in the practice of law.[2] The Mississippi Supreme Court has

[46] *Id.*

[1] Rhode Island Bar Ass'n v. Automobile Serv. Ass'n, 55 R.I. 122, 179 A.139 (1935); Grievance Comm. v. Dean, 190 S.W.2d 126 (Tex. Civ. App. 1945).

[2] MISS. CODE ANN. § 8682 (1956).

stated that the acts designated in Section 8682 as constituting the practice of law are not a complete enumeration of such acts and the courts have "inherent authority, independent of statute, to decide what acts constitute the practice of law."[3] Enactments of the legislature are considered to be in aid of the judicial prerogative to regulate the practice of law and not to be in derogation of this prerogative.[4] If the judicial branch did not have the power to control or punish unauthorized persons who presume to practice as attorneys and officers of the court, the power to control bar admissions would be nugatory.[5] Although definitions of practice are as numerous as the cases which concern it, the courts have not been able to find an all inclusive test. In *Grievance Committee v. Payne*[6] the court said:

> Attempts to define the practice of law have not been particularly successful. The reason for this is the broad field covered. The more practical approach is to consider each state of facts and determine whether it falls within the fair intendment of the term.[7]

It is generally recognized that the practice of law is not limited to the conduct of cases in court,[8] but also includes conveyancing,[9] the preparation of contracts,[10] the drafting of corporate charters and related documents,[11] the drawing and the supervising of the execution of wills,[12] and in general, all advice of clients, and all action taken for them in matters connected with the law.[13] The landmark case of *Bump v. District Court*[14] contains a classic definition of unauthorized practice and an explanation of why the public interest requires that it be stopped. The court adopted the language of the 1941 report of the American Bar Association Committee on Unauthorized Practice of Law which reads as follows:

> The public, far more than the lawyer, suffers injury from unauthorized practice of law. The fight to stop it is the public's fight. No man is required to employ a lawyer if he does not wish to. But every man is entitled to receive legal advice from men skilled in law, qualified by character, sworn to maintain a high standard of professional ethics, and subject to the control and discipline of the court. Not only this, he must be served disinterestedly by a lawyer who is his lawyer, not motivated or controlled by a divided or outside allegiance.

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[3] Darby v. Mississippi State Bd. of Bar Adm., 185 So. 2d 684 (Miss. 1966).

[4] Arkansas Bar Ass'n v. Union Nat'l Bank, 224 Ark. 48, 273 S.W.2d 408 (1954).

[5] State *ex rel.* Wright v. Barlow, 131 Neb. 294, 268 N.W. 95 (1936).

[6] 128 Conn. 325, 22 A.2d 623 (1941).

[7] *Id.* at 625.

[8] *In re Duncan*, 83 S.C. 186, 65 S.E. 210 (1909).

[9] *Id.* at 211.

[10] State v. Sperry, 140 So. 2d 587 (Fla. 1962), *rev'd on other grounds*, 373 U.S. 379 (1963).

[11] Florida Bar v. Town, 174 So. 2d 395 (Fla. 1965).

[12] People v. Peoples Trust Co., 180 App. Div. 494, 167 N.Y.S. 767 (1917).

[13] *In re* Duncan, 83 S.C. 186, 65 S.E. 210 (1909).

[14] 232 Iowa 623, 5 N.W.2d 914 (1942).

> Unauthorized practice of law is the attempt by laymen and corporations to make it a business for profit of giving the public, as a substitute, the services of unqualified and unprofessional persons, or to employ and furnish for profit, directly or indirectly, the services of lawyers who may be willing to sabotage professional ethics in order to secure employment.
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> In either case, the public is cheated; either by receiving incompetent and unethical advice, or by being served by lawyers who are not disinterested, whose real client is not the person advised, but the entrepreneur furnishing the services.[15]

The courts have considered several elements in deciding if an act constituted the practice of law. It has been held that it is not necessary that a fee be charged in order for the services performed to constitute the unauthorized practice of law,[16] but some courts have stated that whether a fee was charged is an important factor in determining if the service was the practice of law.[17] In the case of *Washington State Bar Association v. Washington Association of Realtors*,[18] the court, speaking of fees, said:

> The probability of injurious consequences from the acts of the unskilled is shown by the constant stream of litigation arising from this source. These consequences are not made less probable, nor are their results less severe, because the unskilled are not paid for their services. The same harm can be caused whether the work be done gratuitously or for a fee. The nature and character of the service rendered, rather than the fact of compensation for it should govern its classification and relation to the public interest.[19]

This would seem to be the better view regarding the charging of a fee, and it was adopted by the Mississippi Supreme Court in the case of *Darby v. Mississippi State Board of Bar Admissions*.[20] Whether the act was part of a course of conduct or was only a single act has also been considered. It has been held that it is not necessary for a person to be engaged in a course of conduct over a period of time in order to be engaged in the practice of law.[21] In the case of *People v. Ring*[22] the court said that the receipt of a fee stamps the the transaction as one of a business nature and the practice of law even though it is a single act.

The question of who has a right to bring an action against a person who is engaging in the unauthorized practice of law has often been before the courts. In the case of *Fitchett v. Taylor*[23] the court considered

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[15] *Id.* at 922.

[16] *In re* Baker, 8 N.J. 321, 85 A.2d 505 (1951); Grievance Comm. v. Dean, 190 S.W.2d 126 (Tex. Civ. App. 1945).

[17] *In re* Matthews, 57 Idaho 75, 62 P.2d 578 (1936); Clark v. Reardon, 231 Mo. App. 666, 104 S.W.2d 407 (1937).

[18] 41 Wash. 2d 697, 251 P.2d 619 (1952).

[19] *Id.* at 621.

[20] 185 So. 2d 684 (Miss. 1966).

[21] *In re* Baker, 8 N.J. 321, 85 A.2d 505 (1951).

[22] 26 Cal. App. 2d 768, 70 P.2d 281 (1937).

[23] 191 Minn. 582, 254 N.W. 910 (1934).

the right in the nature of a franchise and held that the plaintiffs, individual attorneys suing for the benefit of all the affected members of the legal profession, were entitled to an injunction to prevent the unauthorized practice. In *Bar Association of Montgomery County v. District Title Ins. Co.*[24] the court held that the county bar association had no interest, apart from the interests of its members, in policing the practice of law, and thus it had no standing to sue; but the court said that an individual member of the association could sue. An opposite result was reached in *Washington State Bar Association v. Washington Association of Realtors*,[25] in which the court held that it was not necessary for the plaintiff to have a pecuniary or a property interest in order to sue, since the action was brought on behalf of the public, and the court allowed the state bar association to bring the suit. Local bar associations have also been allowed to bring actions to prevent unauthorized practice. In the case of *Re New York County Lawyers Association*[26] the court stated that any bar association could institute an action to prevent the unauthorized practice of law.[26] The same result was reached in *Bar Association of Dallas v. Hexter Title & Abstract Co.*[27] The Mississippi Supreme Court in the case of *Darby v. Mississippi State Board of Bar Admissions*[28] held that the State Board of Bar Admissions, the county bar associations, and individual attorneys had the right to bring the action. Mississippi has a statute which authorizes the bringing of an action for an injunction by any state board authorized to hold examinations and grant licenses to prevent an unlicensed person from practicing the profession.[29] The State Board of Bar Admissions supervises admissions to the Mississippi State Bar, including the giving of bar examinations and the granting of licenses, so it was entitled to bring an action to enjoin a person engaging in the unauthorized practice of law.[30] The court stated that the Neshoba County Bar Association and the individual members of the bar of Neshoba County had a right to bring the suit because they had an interest in the subject matter, they had responsibilities as officers of the court, and they were affected by any unauthorized practice of law.[31]

The methods of restraint imposed by the courts have been in the form of contempt proceedings,[32] misdemeanor convictions,[33] injunctions,[34] and damages for negligence.[35] In addition to the statute mentioned above providing injunctive relief, Mississippi has a statute which makes

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[24] 224 Md. 474, 168 A.2d 395 (1961).

[25] 41 Wash. 2d 697, 251 P.2d 619 (1952).

[26] 273 App. Div. 524, 78 N.Y.S.2d 209 (1948).

[27] 175 S.W.2d 108 (Tex. Civ. App. 1943).

[28] 185 So. 2d 684 (Miss. 1966).

[29] MISS. CODE ANN. § 8923-51 (1956).

[30] Darby v. Mississippi State Bd. of Bar Adm., 185 So. 2d 684 (Miss. 1966).

[31] *Id.* at 686.

[32] Kentucky State Bar Ass'n v. First Fed. Sav. & Loan Ass'n, 342 S.W.2d 397 (Ky. 1961); People *ex rel.* Chicago Bar Ass'n v. Goodman, 366 Ill. 346, 8 N.E.2d 941, *cert. denied*, 302 U.S. 728 (1937).

[33] People v. Alfani, 227 N.Y. 334, 125 N.E. 671 (1919).

[34] McMillin v. McCahan, 140 Ohio 2d 221, 167 N.E.2d 541 (1960); Auerbacher v. Wood, 139 N.J.Eq. 599, 53 A.2d 800 (Ct. Ch. 1947).

[35] Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 (1958).

it a crime for an unlicensed person to engage in the practice of law.[36]

Another statute makes it a misdemeanor for the clerk of any court or his assistant, or for any sheriff or his deputy to engage in the practice of law, or to receive any fee for such services during his term of office.[37] It has been held that this statute does not make it unlawful for a chancery clerk to draw his own deed in a single transaction.[38] Another statute makes it a misdemeanor for any person to engage in the practice of law who has not been licensed according to law.[39] Also, the remedy of injunction conferred by section 8923-51 is in addition to all other statutes dealing with this subject, and the institution and prosecution of any action does not preclude the institution and prosecution of an action under other appropriate civil or criminal statutes.[40]

An examination of several cases is necessary to an understanding of when laymen encroach on the activities of lawyers. Unauthorized practice of law is more likely to occur in fields that have close relationship with legal matters, such as banking, real estate, and collection agencies, and most of the cases have been confined to these fields.

In *Green v. Huntington National Bank*[41] members of the Unauthorized Practice of Law Committee of the Ohio State Bar Association sought to enjoin the defendant from practicing law. The court held that one who repeatedly gives legal advice to others with the expectation of compensation is engaged in the practice of law even though he also advise the persons to consult their attorneys and refuses to draw any instruments for them. The court also stated that a bank or trust company does not engage in the practice of law by discussing with the attorney for a customer or prospective customer of the bank any and all of the legal problems involved in the planning or administration of the customer's estate.[42] In *People ex rel. Committee on Grievances v. Denver Clearing House Banks*[43] the court said that the drawing of wills by bank trust departments was the practice of law for three reasons: (1) profound legal knowledge is necessary for a person to engage in this work; (2) such instruments, before they become effective, must be filed in and administered by a court; (3) the weight of authority so holds. The court also said that the drafting of living trust agreements and life insurance trust agreements, and the giving of legal advice to executors of such instruments is the practice of law.[44]

Real estate brokers are frequently found to be engaging in the practice of law. In *Chicago Bar Association v. Quinlan & Tyson, Inc.*[45] the plaintiffs charged that the preparation of offers to purchase and contracts for the purchase or sale of real estate, preparation of deeds, giving of advice concerning closing of real estate transactions, preparation of instruments necessary to clear title to real estate, and the examination of title papers and the giving of advice concerning the validity of titles, constituted the unauthorized practice of law by the defendants. The

[37] Miss. Code Ann. § 2332 (1956).
[38] Miss. Code Ann. § 8669 (1956).
[39] Continental Oil Co. v. Walker, 238 Miss. 211, 117 So. 2d 333 (1960).
[40] Miss. Code Ann. § 8682 (1956).
[41] Miss. Code Ann. § 8923-51 (1956).
[42] 4 Ohio St. 2d 78, 212 N.E.2d 585 (1965).
[43] *Id.* at 590.
[44] 99 Colo. 50, 59 P.2d 468 (1936).
[45] *Id.* at 470.
55 Ill. App. 2d 388, 203 N.E.2d 131 (1964).

court held that a real estate broker may not prepare such forms or advise the parties of the legal effects of the documents and forms.[46] The execution of certain legal documents which constitutes the practice of law has been allowed where the preparation of the papers was incidental to the transaction, and the broker made no separate charge for the services.[47] On somewhat similar facts the Colorado Supreme Court,[48] while holding that such acts were the practice of law, did not prohibit them because they were incidental in character and the public was better served in permitting the acts due to the fact that there were several areas in Colorado in which there were no lawyers available to aid in the drafting of real estate documents. However, where the broker charged a separate compensation or where the activity was independent from a brokerage transaction, this type of activity has been condemned.[49] The practice of law by real estate brokers is directly covered by statute in Mississippi.[50] Section 14 of the statute provides that unless the real estate broker is a licensed attorney in this state, he shall not practice law or give legal advice, or act as a conveyancer, or give advice or opinions as to the effect of legal instruments, or give opinions concerning the validity of titles, or prepare documents fixing and defining the legal rights of parties to a transaction. However, when acting as a broker, he may use an earnest money contract for the protection of either party against unreasonable withdrawal from the transaction, provided such form has been approved by the bar association and the real estate board in the locality where the forms are to be used.[51]

Another area in which problems of unauthorized practice may arise is in the area of collection agencies. In *Nelson v. Smith*[52] the collection agency brought lawsuits on claims assigned to it. The court held this to be the practice of law even though the claims were assigned to the agency and it functioned through a licensed attorney. The court conceded that an assignee is a real party in interest but said that a layman cannot circumvent the statute against the practice of law by unlicensed persons by taking an assignment of the claim and proceeding on his own name.[53] In *State v. James Sanford Agency*[54] the collection agency took assignments of claims under which it agreed to pay the assignors fifty percent of any amount collected. The court said that the assignment did not vest the agency with such title that the attorney was acting solely for the agency. The assignor was directly interested in the suit and the attorney representing him was without the privity necessary in an attorney-client relationship.[55] In the June 1961 issue of the *Wisconsin Bar*

[46] *Id.* at 145.

[47] Hulse v. Criger, 363 Mo. 26, 247 S.W.2d 855 (1952). *But see* Washington State Bar Ass'n v. Washington Ass'n of Realtors, 41 Wash. 2d 697, 251 P.2d 619 (1952).

[48] Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, 135 Colo. 398, 312 P.2d 998 (1957).

[49] Cowern v. Nelson, 207 Minn. 642, 290 N.W. 795 (1940).

[50] MISS. CODE ANN. § 8920-11(14) (1956).

[51] *Id.*

[52] 107 Utah 382, 154 P.2d 634 (1944).

[53] *Id.* at 641.

[54] 167 Tenn. 339, 69 S.W.2d 895 (1934).

[55] *Id.* at 897.

Bulletin there is an opinion of the Ethics Committee of the State Bar of Wisconsin which touches the problem in this area. Concerning when a collection agency can bring suit on a claim of a creditor, the opinion states:

> In order to enable the agency to properly control the litigation, including the naming of the attorney, there must be a bona fide assignment for value of the claim to the collection agency and the creditor shall have relinquished all right and title to the claim. This requires the agency to purchase the claim outright.[56]

Another area that is productive of unauthorized practice of law suits involves the practice of law by public officials who deal in legal matters in the course of their official duties such as clerks of court and notaries public. In a Kentucky case[57] involving the practice of law by a circuit clerk the court held that when the clerk was acting on the advice or under the direction of the county attorney, county judge, or any other licensed attorney, the clerk was correct in his position that he was serving in the capacity of an amanuensis and was not practicing law. The court also said that when he was acting on his own volition for a friend, political supporter, or business associate in drawing probate papers to be filed in his office, even though they were to be signed by the applicant, he was engaged in the unauthorized practice of law.[58]

In an action for damages for drawing an invalid will, a notary public who was not a licensed attorney and who undertook to provide for the disposition of an estate by drafting and supervising the execution of a will was engaged in the unauthorized practice of law and was liable for the loss caused the sole beneficiary.[59]

Another area involved in unauthorized practice of law is the practice of law within the State of Mississippi by outside lawyers who are not members of the Mississippi State Bar. Mississippi has a statute which provides that any attorney of another state, in good professional standing and of good moral character and familiar with the ethics, principles, practices, customs and usages of the legal profession in Mississippi, may appear and plead in any special cause provided that in so appearing the attorney subjects himself to the jurisdiction of the State Board of Bar Admissions and consents to the application of this section. Upon the petition of two members in good standing of the bar of any county who are not members of the same firm raising the question of the qualifications of such attorneys, the State Board of Bar Admissions shall make an inquiry into his qualifications.[60] This problem has arisen recently in connection with certain civil rights groups.

Courts have stated many times that the purpose of the prohibition against persons who are not members of the bar engaging in the practice of law is not for the protection of the lawyer against lay competition but is for the protection of the public.[61] Mississippi courts have

[56] Wis. B. Bull., June 1961 at 45.

[57] Carter v. Brien, 309 S.W.2d 748 (Ky. 1956).

[58] *Id.* at 749.

[59] Biokanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 (1958).

[60] Miss. Code Ann. § 8666 (1956).

[61] Beach Abstract & Guar. Co. v. Bar Ass'n, 230 Ark. 494, 326 S.W.2d (1959); *In re* Baker, 8 N.J. 321, 85 A.2d 505 (1951).

taken a step in the right direction with the case of *Darby v. Mississippi State Board of Bar Admissions.*[62] The court followed what appears to be the majority rule in holding that the receipt of compensation is not necessary for the acts to constitute the unauthorized practice of law and in holding that the courts are not limited in their control of the field by the areas set out in statutes as constituting the practice of law.[63] In many areas litigation is not necessary.[64] Many cases of unauthorized practice by a layman are done unwittingly and a discussion with a local attorney or a small committee is all that is necessary. One of the great needs in this area is to educate the public to the nature and dangers of unauthorized practice. There is also a great need to educate lawyers concerning the nature and extent of unauthorized practice.[65] Lawyers should be able to recognize unauthorized practice and report these invasions of the practice of law to the bar so that adequate remedies may be sought for the protection of the public. One suggestion along these lines is that the Unauthorized Practice of Law Committee of the Mississippi State Bar prepare a pamphlet on the subject and distribute it to bar associations, attorneys, law schools, banks, real estate brokers, collection agencies, and other groups closely associated with legal matters. Another suggestion is the holding of seminars dealing with unauthorized practice.

M. C. Sumners

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[62] 185 So. 2d 684 (Miss. 1966).

[63] *Id.* at 688.

[64] Adler, *Unauthorized Practice: Continuing Campaign in the Public Interest,* 44 A.B.A.J. 649 (1958).

[65] *Id.* at 650.

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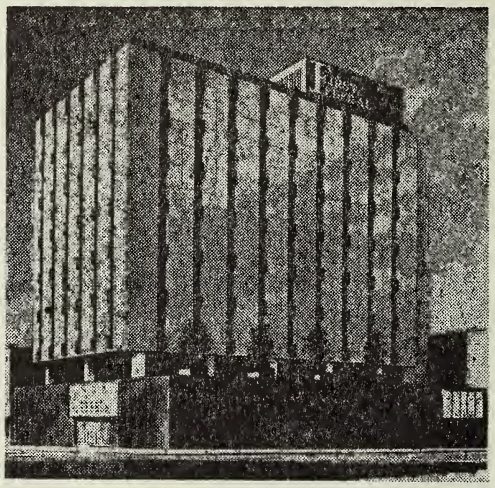

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